EDITOR'S NOTE

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• 85-1384-CFX
atus: GRANTED

Title: William R. Turner, et al., Petitioners
v.
Leonard Safley, et al.

cketed:
ruary 18, 1986

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Herschel, Henry T.

Counsel for respondent: Finch Jr., Floyd R.

try	Date	Note	Proceedings and Orders
1	Feb 18 1986	G	Petition for writ of certiorari filed.
3	Mar 10 1986		Order extending time to file response to petition until April 20, 1986.
4	Apr 20 1986		Brief of respondents Leonard Safley, et al. in opposition filed.
5	Apr 23 1986		DISTRIBUTED. May 15, 1986
7	May 16 1986		REDISTRIBUTED. May 22, 1986
8	May 27 1986		Petition GRANTED.
			**********
10	Jun 16 1986		Order extending time to file brief of petitioner on the merits until August 11, 1986.
11	Jul 25 1986		Joint appendix filed.
12	Aug 4 1986		Record filed.
13	Aug 4 1986		Certified copy of original record and proceedings, 5 volumes, received.
14	Aug 7 1986		Brief of petitioners William R. Turner, et al. filed.
15	Aug 11 1986		Brief amicus curiae of United States filed.
16	Aug 11 1986		Brief amicus curiae of Arkansas, et al. filed.
17	Aug 8 1986		Brief amicus curiae of Texas filed.
18	Aug 20 1986	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Aug 13 1986		Lodging of Texas amicus received.
20	Sep 2 1986		Opposition of respondents to motion of the Solicitor General for leave to participate in oral filed.
21	Sep 10 1986		Lodging received. (9 copies).
22	Sep 8 1986	G	Motion of The Correctional Association of New York for leave to file a brief as amicus curiae filed.
23	Sep 11 1986		Brief of respondents Leonard Safley, et al. filed.
24	Sep 8 1986	G	Motion of Prisoners' Legal Services of New York, Inc., et al. for leave to file a brief as amici curiae filed.
25	Sep 5 1986	G	Motion of Guadalupe Guajardo, et al. for leave to file a brief as amici curiae filed.
26	Sep 22 1986		CIRCULATED.
27	Oct 6 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED. Justice Scalia DUT.
28	Oct 9 1986		Lodging received.
29	Oct 14 1986		Motion of The Correctional Association of New York for leave to file a brief as amicus curiae GRANTED.

8/22

No. 85-1354-CFX

try	Date	Note	Proceedings and Orders
0	Oct 14 1986		Motion of Prisoners' Legal Services of New York, Inc., et al. for leave to file a brief as amici curiae GRANTED.
1	Oct 14 1986		Motion of Guadalupe Guajardo, et al. for leave to file a brief as amici curiae GRANTED.
2	Nov 14 1986		SET FOR ARGUMENT. Tuesday, January 13, 1987. (1st case)
3	Jan 2 1987	X	Reply brief of petitioners William R. Turner, et al. filed.
4	Jan 13 1987		ARGUED.

85-1384

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM R. TURNER; KATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JAMES PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY,
Employees of the Department of Corrections and Human Resources for the State of Missouri
Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,
Respondent.

DR. LEE ROY BLACK; DAVID W. BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT,
Employees of the Department of Corrections and Human Resources for the State of Missouri
Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,
Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Appeals Court for the Eighth Circuit incorrectly applied the "least restrictive alternative test" to their analysis and assessment of the Missouri Department of Corrections and Human Resources' (A): regulation of inmate to inmate correspondence which did not permit correspondence between inmates without prior approval of their classification team, and (B): of inmate marriages which did not permit inmates to marry without presenting the institutional head with a "compelling reason" for the marriage in that the use of the standard of strict scrutiny of the "least restrictive alternative" test enunciated in *Procunier* v. *Martinez*, 416 U.S. 396 (1974) rather than the "rational relation" test of *Jones* v. *North Carolina Prisoner's Union, Inc.*, 433 U.S. 119 (1977) was an improper application of the law?

2. Whether the findings of facts in a case which declared two regulations affecting over 8,000 inmates to be unconstitutional were sufficient in that they failed to find anything more than occasional instances of arguably unconstitutional conduct and did not find any pattern or practice of constitutional abuse committed by the officials of the Missouri Department of Corrections and Human Resources?

LIST OF ALL PARTIES

1. Petitioners', who were appellants and defendants below, are various employees of the Missouri Department of Corrections and Human Resources.

William L. Webster
Attorney General
Michael L. Boicourt, Chief Counsel
Special Litigation Division
Henry T. Herschel
Assistant Attorney General of Counsel

2. Respondents' who were appellees and plaintiffs below, are Leonard Safley and Mary Webb, individually and as a class of similarly situated people.

Floyd R. Finch, Jr.
Blackwell, Sanders, Matheny, Weary and Lombardi
2480 Pershing Road
Kansas City, Missouri 64108

TABLE OF CONTENTS

CITATIONS

Cases

Statutes and Miscellaneous Citations

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM R. TURNER; KATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JAMES PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY,
Employees of the Department of Corrections and Human Resources for the State of Missouri
Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,
Respondent.

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Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, but is designated by the numbers 84-1827 and 84-2337; it appears in Appendix A attached hereto. The opinions of the United States District Court for the Western District of Missouri; a memorandum and order, as reported at *Safley, et al.* v. *Turner, et al.*, 586 F.Supp. 589 (W.D. Mo. 1984), was filed on May 7, 1984; it appears in Appendix B attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit affirming the District Court decision declaring the petitioners regulations concerning correspondence and marriage unconstitutional pursuant to 42 U.S.C. § 1983. Pursuant to Title 28, U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed within ninety (90) days of the entry of this judgment, on or before February 18, 1986. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. Title 42 U.S.C. § 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

The respondents initiated this lawsuit by filing a complaint for damages in the Western District of Missouri. An attorney was appointed and later, after the District Court consolidated a damage action numbered 81-0891 and an injunctive action numbered 82-0022, the District Court permitted the respondents to amend their complaint on October 5, 1983 and be certified as a class pursuant to Rule 23(b)(2), F.R.Civ. P.[1] A trial, without jury, was held lasting for a five day period during February, 1984. On May 7, 1984, the District Court filed its "Memorandum, Opinion and Order". The Dis-

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[1]The class is made up of the following persons:

A. Persons who either are or may be confined to the Renz Correctional Center and who desire to correspond with inmates at other Missouri correctional facilities or persons outside of the Missouri Division of Corrections.

B. Persons who desire to correspond with inmates of any Missouri correctional institution whose correspondence with inmates of Missouri correctional institutions has been stopped or delayed for any reason other than an attempt to violate the extant rules of the Missouri Division of Corrections concerning correspondence.

C. Persons who desire to visit or marry inmates of Missouri correctional institutions and whose rights of correspondent visitation, or marriage have been or will be violated by employees of the Missouri Division of Corrections.

trict Court, the Honorable Howard F. Sachs presiding, held that the Missouri Department of Corrections and Human Resources' (hereafter referred to as the petifioners) regulation which required inmates to provide prison officials with a compelling reason before permission would be given for their marriage was an unnecessary infringement upon the fundamental privacy interests of the marital relationship. *Safley* v. *Turner,* 586 F.Supp. 589, 594 (W.D. Mo. 1984) The District Court found that the prison officials had not borne their burden of proof in failing to present a pattern of security or rehabilitative concerns which warranted the regulation when there was a less restrictive alternative available in the form of "counseling" by the superintendent. *Id.* at 594. In a similar vein, the District Court found that petitioners' regulations which did not permit correspondence between inmates in separate institutions within and outside the State of Missouri without the prior approval of the prisoner's classification team was an infringement on the inmates First Amendment rights as enunciated under *Procunier* v. *Martinez,* 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974). *Safley* v. *Turner, supra,* 586 F.Supp. at 595. The District Court held that a less restrictive alternative which would require the prison officials to review each piece of correspondence between inmates was a security measure which was sufficient to protect the institution and its inhabitants from danger. *Id.* at 596.

The District Court also found the petitioner's rule prohibiting former inmates from visiting inmates in prisons until after they have been in a non-prison setting for more than six months to be a legitimate exercise of discretion and denied the respondent's claim for damages because all the issues presented were sufficiently "novel or unsettled" so that a "good faith defense" could be recognized. *Id.* at 596-97.

Notice of appeal was filed by the petitioners and briefs were submitted to the Appeals Court of the Eighth Circuit.

The respondents did not seek to appeal the decision of the District Court.

On appeal, in an opinion filed November 19, 1985, the United States Court of Appeals for the Eighth Circuit affirmed that portion of the District Court order finding that the challenged marriage and correspondence regulations were inconsistent with constitutional prohibitions against interference with the First Amendment and privacy rights implied in the Fourteenth Amendment to the United States Constitution. Appendix A-12, 16. The Circuit Court, in its discussion of the correspondence rule, affirmed the District Court's application of the standard of strict scrutiny announced by this Court in *Procunier* v. *Martinez, supra,* on the basis that First Amendment speech rights were directly implicated and ultimately were deprived by the enforcement of the regulations in the instant case. Appendix A, p. 7-8. Further, the Circuit Court found there was no showing that the exchange of mail between inmates in different institutions was "inherently dangerous" enough to merit the application of the rational relation test enuciated in *Jones* v. *North Carolina Prisoners Labor Union, Inc.,* 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) and *Bell* v. *Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Appendix A. p. 9.

In a similar analysis, the Circuit Court found that the petitioner's regulations governing the application by inmates permission to be married was an unconstitutional infringement of fundamental privacy rights of inmates. Appendix A-13. As with its decision concerning the correspondence rule, the Circuit Court found that since marriage was a fundamental right and the regulation absolutely prohibited some inmates from getting married, a standard of "strict scrutiny" was the appropriate rule of law to be applied to the facts of the case. Appendix A-16. The Circuit Court could not find any state interest important enough to sustain the petitioner's regulation.

Finally, the court found that District Court's findings of fact were not clearly erroneous and did not proceed from an erroneous theory or conception of the law. Appendix A-17.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The basis for the United States District Court's jurisdiction in this case was Title 28 U.S.C. §§ 1331 and 1343.

ARGUMENT

The Eighth Circuit Court of Appeals found that it was unnecessary to determine whether the correspondence regulation promulgated by the Missouri Department of Corrections and Human Resources was rationally related to the legitimate goals of security, rehabilitation, and the maintenance of the internal order of the institution in accordance with this Court's rulings in *Jones* v. *North Carolina Prisoners Labor Union, Inc., supra; Bell* v. *Wolfish, supra;* and *Pell* v. *Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), because the correspondence regulation was not a "time, place or manner" regulation. They held that the two prong strict scrutiny test employed by this Court in *United States* v. *Grace,* ___ U.S. ___ 103 S.Ct. 1702, 1907 (1983); and *Procunier* v. *Martinez,* 416 U.S. 396 (1974) was the appropriate standard to be applied to the case at bar. Appendix A-8-9. In a similar manner, the court found both of the regulations regarding marriage promulgated by the petitioners to be unconstitutional because the marriage decision itself was a fundamental right distinct from, "but equally as important" as the decision relating to other family matters. Again, the court found that the strict scrutiny test of *Procunier* v. *Martinez, supra,* was the appropriate test to be applied in the situation because the regulation was not a "time, place or manner" regulation, and no alternative methods of exercising the right were available. Appendix A-15-16.

The courts below reached their decision concerning the correspondence regulation in spite of evidence from the petitioners and one expert in the administration of correctional institutions who testified that it would be impossible to monitor all inmate mail and that it was imperative that the correctional officials be permitted to limit correspondence to those inmates they trusted in the interests of maintaining prison security and the rehabilitation of inmates. The Court below did not recognize that inmate to inmate correspon-

dence has many of the characteristics of the "inherently dangerous" problems in the association of prisoners noted by this Court in *Jones* v. *North Carolina Prisoners Labor Union, Inc., supra,* 433 U.S. at 132-133.

In regards to the marriage issue, the Circuit Court did not recognize that inmate marriages, especially to another inmate, are usually not beneficial to the rehabilitative process and can be a threat to the security of an institution. Furthermore, there was evidence that the superintendent of the institution was concerned that the creation of "love triangles" would increase the danger of violent confrontation. This is especially important since the Renz Correctional Institution is a unique institution. Not only does it hold maximum, medium and minimum security inmates of both sexes, but the prison is surrounded by a minimum security perimeter.

Since the Circuit Court applied the least restrictive alternative test of *Procunier* v. *Martinez, supra,* it required that the petitioner present a pattern of security concerns which would justify not employing the least restrictive alternative of reviewing each piece of correspondence which would be sent between inmates or counseling each inmate concerning his or her marriage. By requiring the prison officials to produce more than "sincerely held beliefs" into evidence, they violated this Court's admonition that it was the inmates' burden t, prove that the prison officials were not conclusively wrong in their belief that certain regulations were necessary to obtain certain penological goals. *Jones* v. *North Carolina Labor Union, Inc., supra,* 97 U.S. at 132-133.

I.

Correspondence Rule

In the present case, it is submitted that the court below erred in the application of the least restrictive alternative standard to the review of the petitioners' correspondence rule.

The Court below attempted to limit this Court's analysis and the standards as applied in *Jones* v. *North Carolina Prisoners Union, Inc,. supra, Bell* v. *Wolfish, supra,* and *Pell* v. *Procunier, supra,* (hereafter referred to as the rational relation test) to only those activities which were "inherently dangerous" and were "inconsistent with the fact of incarceration".

This type of analysis necessarily shifts the burden of proof from inmates to prison officials, skews the theory and violates the spirit of this Court's analysis of inmates' rights in a prison setting. Fundamentally, it was error not to analyze the petitioners' regulation on the basis of whether the regulations were rationally related to legitimate penological goals. Once established that the regulation is rationally related to a proper penological goal, the burden should have shifted to the inmates to demonstrate that the prison officials had substantially exaggerated their response to these concerns. *Bell* v. *Wolfish, supra,* 441 U.S. at 540-541, n.23. The Circuit Court found that the exchange of correspondence between inmates, communication among inmates, was not in that area of activities which was of a "special danger inherent in the concerted action of inmates". The court further emphasized that the prison regulations approved by this Court in *Jones* v. *North Carolina Prisoner's Union, Inc., supra; Bell* v. *Wolfish, supra;* and *Pell* v. *Procunier, supra,* were "time, place or manner" regulations and were "content neutral".

The important aspects of a "time, place and manner" regulation is that it does not restrict the content of the speech and that it fairly permits the activity at a particular place and at a particular time. It was noted by Justice Marshall in *Grayned* v. *City of Rockford,* 408 U.S. 104, 115-117, 92 S.Ct. 2294, 2303-2304, 33 L.Ed.2d 222 (1972) that:

> [G]overnment has no power to restrict [speech] activity because of its message . . . [but] reasonable 'time,

place and manner' regulations may be necessary to further significant governmental interests, and are permitted. For example, two parades cannot march on the same street simultaneously and government may allow only one. [citations omitted] A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. [citations omitted] If overamplified loud speakers assault the citizenry, government may turn them down. [citations omitted]

* * *

The nature of the place, 'the pattern of its normal activities, dictates the kinds of regulations of time, place and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time.* Our cases make clear that in assessing the reasonableness of regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. "Access to [public places] for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly". [Emphasis added.]

See also; *Effron* v. *Intern Soc. for Krishna Consciousness*, 452 U.S. 640, 648, 101 S.Ct. 2559, 2564, 69 L.Ed.2d (1981).

It is submitted that the Circuit Court below erred because it did not review the exercise of the prisoners' rights in light of the forum in which it was to be exercised. This exercise of the right to communicate was not performed in a public place and did not involve free citizens of the world. The petitioners'

regulation was solely aimed at the restriction of the exercise of communication between lawfully incarcerated inmates at different prisons. The regulation was "content neutral" because once communication was approved between inmates, their correspondence was not censored or otherwise regulated.

Although prisoners do not lose all their rights when they are incarcerated, the fact of incarceration limits the exercise of most of the rights that non-inmates take for granted. *Jones* v. *North Carolina Prisoners Union, Inc., supra*, 433 U.S. at 125-126. Voting, travel, religious observance, speech, marriage and communication are limited by the operational realities and the legitimate penological interests of the prison. This is not to propose that the analysis is limited merely to the type of individual involved, but it is important to note that who individuals are, where they are located, and what they are capable of doing plays a substantial and important part in weighing the various factors when applying a regulation which can justifiably restrict the exercise of a constitutional right. It is in support of this view that Justice Stewart noted in *Pell* v. *Procunier, supra*:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restrictions on personal communication among members of the general public. We recognize, however, that '[t]he relationship of state prisoners and state officers who supervise their confinement is far more intimate than that of state and private citizens' and that the internal problems of state prisoners involve issues particularly within the state's authority and expertise.

Pell v. *Procunier, supra*, 417 U.S. at 825-826; *See also Wolf* v. *McDonnell*, 418 U.S. 539, 575-576, 94 S.Ct. 2963, 2984, 41 L.Ed.2d 935 (1974). The regulation in the present case was not intended to prohibit all correspondence between inmates; it required only that the inmate obtain prior approval before

corresponding with other inmates in other institutions. The least restrictive alternative to this regulation, as found by the Circuit Court, was for the prison official to review each piece of mail between inmates. As the testimony at the trial indicated, state officials did not believe that it was possible to review each piece of mail and felt that such a regulation would leave them open for the transfer of information detrimental to the operation of the prison and the protection of inmates and staff.

The Circuit Court below contended that it was only activities engaged in by prisoners which were "inherently dangerous" which should be afforded the deference of the rational relation test enunciated in *Jones* v. *North Carolina Prisoners Union, Inc., supra, Bell* v. *Wolfish, supra,* and *Pell* v. *Procunier, supra.* This is a surprising assertion in light of the deference which is required to be given to the decision of prison officials regarding the maintenance of internal order at a prison. *Jones* v. *North Carolina Labor Union, Inc., supra.* 433 U.S. at 125-126. Nor is the characterization of "inherently dangerous" activities is sufficiently clear to provide prison officials with sufficient notice to provide reasonable direction in the drafting of regulations. The Circuit Court's analysis and definition of "inherently dangerous" also is not based on the operational realities of a prison. Prisons, because of their structural identity and in the complexion of their population, differ from one and another in a myriad of ways. The prison at issue in this case is a co-correctional institution, housing maximum, medium, and minimum security prisoners.[2] What could be characterized as dangerous at one of the petitioners' institution could not always be

[2]Maximum and medium security level women were housed at Renz Correctional Center, and minimum security men were housed at Renz. The institution, at that time, also housed prisoners who were being "hidden" from enemies within the correctional system.

considered dangerous at another institution. The court below noted that concerted group activity among inmates was an "inherently dangerous" activity, but that "mere communication" between prisoners in different institutions was not as dangerous an activity. The essence of the danger of group activity inside a prison is the communication between, and the coordination of, inmates' action. Group activities, such as riots, gang or revenge killings, and escapes are just as serious, if not more serious, when the efforts are coordinated between more than one prison. The fact that inmates are separated by many miles is small solace to a director of a system when problems break out simultaneously in different prisons. The primary tenet of the control of concerted group activity within a prison system is to break up the group or separate leaders. Since communication between the prisons is now permitted, that solution is impossible in the Missouri prison system.

The Circuit Court also was extremely concerned that there was no alternative avenue of communication for these inmates. Initially, as pointed out repeatedly, this regulation does not cut off communication between inmates. Even by its strictest interpretation, the regulation only restricts the communication between inmates. The press, civilians, inmates who have been released for more than six months, and relatives of inmates who are incarcerated are permitted to correspond with inmates on the inside of the prison.

The use of the "least restrictive alternative test" also unfairly shifted the burden of proof from the prisoners to the petitioners to prove by substantial evidence that the prison officials exaggerated their response to the security considerations involved; and to the prison officials to prove a pattern of security concerns. *Bell* v. *Wolfish, supra,* 441 U.S., at 540-541, n. 23. This switch in the burden of proof is in conflict with this Court's principles and even with the Eighth Circuit's own guidance in the area. *Jones* v. *North Carolina*

Prisoners Union, Inc., supra, 433 U.S. at 127-128; *Rogers* v. *Scurr,* 676 F.2d 1211, 1215 (8th Cir. 1982); *Otey* v. *Best,* 680 F.2d 1231, 1233 (8th Cir. 1982). Using the two prong test of *Procunier* v. *Martinez, supra,* prison officials are left with the nearly impossible task of attempting to demonstrate to a court that the least restrictive alternative would not work as well as the regulation already in place. In the present case, if the regulation is working, it is difficult for prison officials to produce evidence of what bad results would occur if the regulations were found to be unconstitutional. If the prison officials cannot produce bodies, they are crying wolf; if they can, they have failed in their duty to protect their charges. Prison officials have to be able to anticipate trouble; if they can only react to it, they will eventually fail. Failure in the business of prison administration is usually more tragic than failure in other human endeavors. See *Jones* v. *North Carolina Labor Union, Inc., supra.* It is also a high price to pay for experimentation in theoretical prison management.

Furthermore, a Writ of Certiorari should issue in this case because there is a need for guidance to the lower courts in reviewing prison regulations governing communication between inmates. During this period of rising gang violence (a trend which the State of Missouri has not avoided), it is important that this Court lay careful and clear guidelines on how far prison officials may go in drafting regulations which can restrict communication between inmates to protect other inmates and the staff of an institution. To be able to do this, prison officials need to know which standard is to be applied when dealing with issues that affect purely inmate to inmate relations. At present there have been some differences in the lower courts concerning whether a strict scrutiny test or a rational relations test should be applied, and whether the control of inmate-to-inmate communication is a compelling

state interest and thus, would survive scrutiny under either or both standards.[3]

II.

The Marriage Rule.

In the Circuit Court, two regulations concerning marriages within the Missouri Department of Corrections and Human Resources were at issue. Prior to December 1, 1983, the "old rule" set out procedures to be followed when an inmate desired to get married. That rule had no explicit provision permitting a superintendent to deny a request to be married; however, Superintendent Turner testified that he had the inherent power to control his institution. After December 1, 1983, a new marriage regulation was promulgated. Under this rule, an inmate desiring to marry had to file a written request stating the reasons for the marriage, and the superintendent was given the explicit authority to approve the request when there were "compelling reasons" to do so. On its face the rule applied to both inmates and outsiders, but it became clear at the trial that the regulation was intended to apply primarily to inmate-to-inmate marriage.

The court below, relying on *Zablocki* v. *Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), held that marriage, even without cohabitation, sexual intercourse, and the begetting and the raising of children, was a fundamental right, and the

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[3]*Cases Favoring Stricter Scrutiny and Least Restrictive Alternative Test: Abdul Wali* v. *Coughlin,* 754 F.2d 1015 (2nd Cir. 1985); *Bradbury* v. *Wainwright,* 718 F.2d 1538 (11th Cir. 1983); *Watts* v. *Brewer,* 588 F.2d 646 (8th Cir. 1978).

Cases Favoring Deference and Rational Relations Test: Pittman v. *Hutto,* 594 F.2d 407 (4th Cir. 1979); *Rogers* v. *Scurr,* 676 F.2d 1211 (8th Cir. 1982); *Otey* v. *Best,* 680 F.2d 1231 (8th Cir. 1982); *St. Claire* v. *Cuyler,* 634 F.2d 198 (2d Cir. 1980); *Expedito* v. *Leddy,* 618 F.Supp. 1362 (E.D. Ill. 1985); *Fowler* v. *Graham,* 478 F.Supp. 90 (D.S. 1979); *Mitchel* v. *Carson,* 404 F.Supp. 1220 (D. Kan. 1975); *Lawrence* v. *Davis,* 401 F.Supp. 1203 (W.D. Va 1975).

restrictions on the right required the strict scrutiny test in *Procunier* v. *Martinez, supra*. They held that this test applied, as with the correspondence rule, and that the petitioners' regulation did not involve the regulation of a "time, place or manner" by which a marriage could take place, but rather deprived the inmates of any right to be married. Furthermore, the regulation did not provide the inmates with any alternative way of exercising their desire to marry.

As with the correspondence issue, the petitioners would argue that the court erred below because it used an incorrect legal standard when it applied the least restrictive alternative test. It failed to assess the appropriate burden of proof on the parties and therefore failed to give the appropriate difference to the regulations and to the discretion of the correctional officials.

The court below seemed influenced by the fact that the marriage regulations required a "compelling reason" for marriage. They found that this somehow deprived, rather than limited, the inmates of the exercise of their privacy rights under the Fourteenth Amendment. Although, as conceded, the prison officials do not believe that it is in the best rehabilitative interest in most cases to permit inmates to marry other inmates, that is not to say this regulation is an absolute ban against the marriage of inmates.

The exercise of fundamental rights, like all other rights, has to be limited by the fact of incarceration. The *Martinez* strict scrutiny standard should not be imposed just because a prison regulation would limit a person, however severely, in the exercise of a right. It is important to note that "time, place and manner" regulations must be tailored to the forum in which they function. In the present case, the drafters of the regulations are dealing with inmates, women who have made some seriously detrimental choices in life some of which involved men, who should not necessarily be permitted to make the same mistakes over and over again. It was noted

by the District Court, and it is assumed it was ageeed with by the Circuit Court, that inmates should be permitted to make their own mistakes. That probably highlights the difference between the legal positions of petitioners and the respondents in this case. Neither of the courts below noted any evil motives on the part of the superintendent of the institution. In fact, his sin was "p[illegible]nalism". *Safley* v. *Turner et al., supra*, 586 F.Supp at 597. The petitioners can not permit these inmates to make mistakes again and again and fulfill its duty to rehabilitate and protect its charges. At least while they are incarcerated, inmates should not be permitted to make choices that would militate against their rehabilitation, especially if those choices are, in substance, empty ones.

The court below made much of the fact that this Court in *Zablocki* v. *Redhail, supra*, in an opinion delivered by Justice Marshall, found that the decision to marry, standing alone, was protected by the right to privacy implicit in the Fourteenth Amendment's Due Process Clause. 98 U.S. at 386. Frankly, no one has ever disputed whether the right to marry was or was not a fundamental right. What remains disputed is whether the petitioners have to take on the administrative burdens implicit in having incarcerated inmates marry or remarry. The question is whether the prison officials have the right to substitute their judgment for that of inmates who are incarcerated. The court below did deem this to be an area that invoked the lenient scrutiny of an "inherently dangerous" activity even though there was testimony that the prison officials considered that love triangles threatened the safety of the institution and other inmates.

In the same sense as with the correspondence rule, the Circuit Court's analysis misapplies this Court's principles found in *Jones* v. *North Carolina Prisoners' Union, Inc., supra; Bell* v. *Wolfish, supra*, and *Pell* v. *Procunier, supra*, by relying on the stricter two-prong scrutiny test found in *Procunier* v. *Martinez, supra*. This reliance inherently skews the

analysis and does not permit the appropriate guidance to state officials.

In addition, until relatively recently, it was thought that a prisoner had no right to have a marriage ceremony performed in prison. At present, there is confusion on the applicable standards to be applied and limitations permissible on inmate marriages.[4]

The petitioners believe that the Circuit Court simply misconstrued and misinterpreted the requirements of the rational test. Should a writ of certiorari issue, the petitioners intend to address the actual requirements for the application of the rational relations test.

III.

Findings of Fact

Finally, it is the petitioners' position that the Courts below were clearly erroneous in that a number of the District Court's finding of facts were not supported by evidence legally sufficient to substantiate the findings of facts. The petitioners will also argue that the Court had an erroneous conception of the applicable law. Frankly, in this case, the Court repeatedly made some findings of fact that amounted to, at worst, conclusions that might state a cause of action for damages, but were not sufficient upon which to base a department-wide injunction. Occasions, or instances of certain conduct, even unconstitutional conduct, should not be the

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[4]*Inmate Marriages Permitted: Bradbury* v. *Wainwright*, 718 F.2d 1538 (11th Cir. 1983); *Lockhart* v. *Faulkner*, 574 F.Supp. 606 (N.D. Ind. 1983); *Salisbury* v. *List*, 501 F.Supp. 105 (Nev. 1980).

Inmate Marriages Regulations Upheld: Hudson v. *Rhodes*, 579 F.2d 46 (6th Cir. 1978) (per curiam); *Wool* v. *Hogan*, 505 F.Supp. 928 (D. Vt. 1981); *Polmaskitch* v. *U.S.*, 436 F.Supp. 527, (W.D. Ok. 1977); *Johnson* v. *Rockerfeller*, 365 F.Supp. 377, (SD NY 1973), affirmed MEM.SUB.NOM.; *Butler* v. *Wilson*, 415 U.S. 958, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1973); *In re Golen*, 512 Pac.2d 1028 (Utah 1973), *cert. denied*, 414 U.S. 1128 (1979).

basis for striking down department-wide regulations. At the very least, the District Court should be required to make a find of a pattern or practice of unconstitutional behavior.

It is important that this Court guide the Circuit Courts in the appropriate standards to apply when determining whether a regulation is unconstitutionally infirm.

CONCLUSIONS

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1827

Leonard Safley, et al.,

Appellees,

v.

William R. Turner; Kathy Crocker; Earl Engelbrecht; Betty Bowen; Bernice E. Trickey; Howard Wilkins; James Purkett; William F. Yeager, Larry Trickey,

Appellants.

No. 84-2337

Leonard Safley, et al.,

Appellees,

v.

David W. Blackwell; Lee Roy Black; Donald Wyrick; Betty Bowen; Earl Engelbrecht,

Appellants.

Appeals from the United States District Court for the Western District of Missouri.

Submitted: June 13, 1985
Filed: November 19, 1985

Before ROSS, Circuit Judge, BRIGHT, Senior Circuit Judge, and NICHOL,* Senior District Judge.

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*The HONORABLE FRED J. NICHOL, Senior United States District Judge for the District of South Dakota, sitting by designation.

NICHOL, Senior District Judge.

This is an appeal from a class action in which the district court[1] declared unconstitutional certain regulations of the Missouri prison system. For reversal, appellants argue that the district court applied the incorrect legal standard in determining the constitutionality of the prison rules, and that the district court's findings of fact were clearly erroneous. For the reasons set forth below, we affirm.

BACKGROUND

The challenged regulations were in effect at all institutions within the Missouri Division of Corrections. However, the focus of inquiry at trial was the Renz Correctional Institution (Renz). Renz was originally designed as a minimum security prison farm employing male inmate labor. As such, it has a minimum security perimeter without the usual maximum security elements such as guard towers and walls. Since the late 1970s, Renz has become what is known as a "complex prison"—that is, its population consists of both male and female inmates of varying security levels. Most of the female inmates at Renz are medium and maximum security level offenders, while most of the male inmates are classified as minimum security.

Two regulations are at issue in this appeal. The first dealt with mail between inmates in different institutions within the state, and was set out in Division of Corrections regulation 20-118.010(1)(e):

> Correspondence with immediate family members who are inmates in other correctional institutions will be permitted. Such correspondence may be permitted between non-family members if the classification/treatment team of each inmate deems it in the best interest of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters.

[1]The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

The challenged portion of the rule was that part permitting mail between non-family members only at the discretion of the classification/treatment team of each inmate involved.[2] The team used psychological reports, conduct violations, and progress reports contained in each inmate's file to decide whether to permit correspondence. The testimony indicated that these materials were not actually consulted on each occasion since the team was familiar with the classification files of most of the inmates. Thus, inmate-to-inmate correspondence was controlled by prior approval or disapproval of particular inmates rather than individual review of each piece of mail.

The district court found in Finding of Fact number 5 that

> [t]here have been instances where the divisional correspondence regulation has been violated. For example:
>
> a. Letters have been stopped without notice or explanation to either the correspondent or the recipient;[3]
> b. Mail to and from persons not incarcerated has been stopped or refused on factually incorrect grounds or without legitimate justification;[4]

[2]At Renz, this team consisted of three persons—a case-worker, Betty Bowen; a classification assistant, Warren Karander; and the particular inmate in question. Each member of the team had an equal vote. Tr., Vol. I at 87-89.

[3]Division of Corrections regulations 20-118.010(1)(C) and (2)(C) provide for notification to the sender and addressee when mail containing contraband is confiscated.

[4]The regulation places no restrictions on mail to and from non-inmates except for the prohibition against contraband, escape plots, and the like.

c. Mail to incarcerated family members has been refused or returned without notification or explanation;[5]

d. Mail with former inmates has been refused or returned without notification or explanation.[6]

Safley v. *Turner*, 586 F.Supp. 589, 591 (W.D. Mo. 1984). Moreover, "the rule as practiced [at Renz] is that inmates may not write non-family inmates." *Id.* This practice was set forth in the Renz Inmate Orientation Booklet presented to each inmate upon arrival at Renz. The district court found that correspondence had been denied between married inmates, and between inmates who desired to maintain a friendship. An unwritten rule at Renz required prior approval of inmate-to-inmate legal mail; absent such approval, this mail was routinely opened, stopped and refused despite the divisional regulation stating that such mail "will be permitted." The reasons given for these practices include interception of plans for escape, heading off riots and other disturbances, and controlling the formation and activities of inmate gangs. These matters are of special concern at Renz because of the minimum security perimeter.

The second rule at issue in this appeal involved inmate marriages. Prior to December of 1983, the Missouri prison system operated under divisional regulation 20-117.050, which set out the procedure to be followed when an inmate wished to marry. As the district court noted, this regulation "(a) did not obligate the Missouri Division of Correction to assist an inmate who wanted to get married, but (b) did not authorize

[5]Regulation 20-118.010(1)(E) provides that inmate correspondence with incarcerated family members "will be permitted." Presumably, the prohibition against contraband and the provisions for notice of confiscation apply to family as well as non-family mail.

[6]*See* note 3, *supra*.

the superintendents of the various institutions to prohibit inmates from getting married. Inmates at Renz were, however, frequently denied permission to be married." *Safley*, 586 F.Supp. at 592. On December 1, 1983, after this lawsuit was filed, a new inmate marriage regulation was promulgated providing that "[t]he superintendent may approve the marriage of an inmate when requested when there are compelling reasons to do so." Appellants' Brief, App. E. The burden was on the inmate to provide a compelling reason for the marriage. The term "compelling" was not defined in the regulation. At trial, however, testimony of prison officials indicated that only a pregnancy or the birth of an illegitimate child would be considered compelling reasons.

The district court found that the marriage restrictions were imposed largely on female inmates at Renz and at the Chillicothe Correctional Center for Women, and that the restrictions were motivated primarily by protective attitudes. Apparently many of the female inmates who were denied permission to marry had come from situations involving domestic abuse. Renz's Superintendent Turner believed "that women prisoners whose crimes were connected to abuse that they had suffered . . . needed to concentrate on developing skills of self-reliance." Appellants' Brief at 30. Turner believed it to be in the best rehabilitative interests of the inmates to avoid any personal relationship with another inmate. Security interests were also cited. Appellants contend that "the friction that is caused as a result of a 'love triangle' and the maintenance of 'wholesome' inmate friendships is the basis for a large amount of violence within the prison system." *Id.* at 47-48.

The district court, relying on *Procunier* v. *Martinez*, 416 U.S. 396 (1974), applied a traditional strict scrutiny standard. The court held the marriage rule to be an unconstitutional infringement upon the fundamental right to marry because it was far more restrictive than was either reasonable or essen-

tial for the protection of the state's interests in security and rehabilitation. *Safley,* 586 F.Supp. at 594. Likewise, the mail rule was unnecessarily broad, thus constituting a violation of the inmates' First Amendment rights. *Id.* at 596. The district court also held that the correspondence regulations had been applied in an arbitrary and capricious manner.

THE CORRESPONDENCE RULE

Appellants argue that, because of the plaintiff's status as prisoners, the district court should have applied a rational basis or reasonableness test rather than strict scrutiny in determining the constitutionality of the restriction on inmate-to-inmate correspondence. The issue is one of first impression in this circuit; in fact, we have found only one other decision addressing the precise question of mail between inmates of different institutions. *See Schlobohm* v. *U.S. Attorney General,* 479 F.Supp. 401 (M.D. Pa. 1979) (applying strict scrutiny and finding the regulation constitutional). A series of Supreme Court cases, however, as well as a number of our past decisions concerning First Amendment rights of prisoners may provide guidance.

We begin with the observation that, traditionally, a direct governmental prohibition of the right to free speech is permissible only if the restriction furthers a compelling governmental interest and is the least restrictive alternative for achieving that purpose. *United States* v. *Grace,* ___ U.S. ___, 103 S.Ct. 1702, 1707 (1983); *Perry Education Association* v. *Perry Local Educators' Association,* ___ U.S. ___, 103 S.Ct. 948, 955 (1983). Restrictions on the First Amendment rights of prisoners, however, have presented special problems. "[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Martinez,* 416 U.S. at 405. Yet the duty of the federal courts to protect fundamental constitutional guarantees, even in state penal institutions, remains intact. *Id.* Hence, courts have

struggled to discern the faint line between appropriate deference to prison administrators, on the one hand, and discharge of the judicial duty, on the other.

In *Martinez,* the Supreme Court considered a prisoner mail censorship regulation which proscribed certain forms of expression in inmate correspondence.[7] The Court determined that, because the regulation applied to mail to and from non-inmates as well as inmates, the case did not require an assessment of the extent to which prisoners may claim First Amendment freedoms but instead could be decided on the basis of incidental restrictions on the rights of members of the general public. *Martinez,* 416 U.S. at 408-09. In this light, the Court held that censorship of prisoner mail is justified only if it furthers an important or substantial governmental interest unrelated to the suppression of expression, and the limitation is no greater than necessary or essential to protect that interest. *Id.* at 412. Under this standard, the regulation in *Martinez* was unconstitutional.

Later in the same Term the Court decided *Pell* v. *Procunier,* 417 U.S. 817 (1974), which involved, *inter alia,* a challenge to a prohibition against face-to-face visits between prisoners and news reporters. Because the rule restricted only one manner of communication between inmates and the general public, *id.* at 823, it was regarded as a "time, place or manner" regulation. *Id.* at 826; *see, e.g., Grayned* v. *City of Rockford,* 408 U.S. 104 (1972). The regulation was upheld because it met the traditional "time, place or manner" test. It furthered the important governmental interests in deterrence, security and rehabilitation; it was content-neutral in that it

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[7]Inmates could not write letters in which they "unduly complain," "magnify grievances," or express "inflammatory political, racial, religious or other views or beliefs," nor could they send or receive letters that "pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate." *Martinez,* 416 U.S. at 399-400.

was applied equally to all reporters and prisoners; and, most significantly, several alternative means of communicating with the public, including with reporters, were available to the prisoners. *Pell,* 417 U.S. at 824-25.

In the case at bar, we do not deal with a "time, place or manner" regulation. The challenged mail rule, both on its face and as applied, purports to eliminate all manner of correspondence between inmates not "approved" by the classification/treatment team. Nevertheless, *Martinez* and *Pell* are useful illustrations of the proposition that, although lawful incarceration " 'brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," . . . a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penalogical objectives of the corrections system." *Pell,* 417 U.S. at 822 (citations omitted); *see also Martinez,* 416 U.S. at 422 (Marshall, J., concurring). Implicitly, then, those rights which are not inconsistent with the fact of incarceration or with legitimate penological (sic) objectives retain the highest level of protection afforded by the First Amendment, and their deprivation requires strict scrutiny by the courts. Thus, we must decide whether the right to exchange letters between inmates of different institutions in inconsistent with either of those considerations.

Appellants rely most heavily on two of the Court's more recent decisions. In *Jones* v. *North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977), prison regulations prohibited inmates from soliciting other inmates to join the Union, barred all meetings of the Union, and prevented the delivery of packets of Union publications that had been mailed in bulk to several inmates for redistribution among other prisoners. The Court upheld the regulations because they were "reasonable, and [were] consistent with the inmates' status as prisoners and with the legitimate operational considera-

tions of the institution." *Id.* at 130. However, the Court made clear that First Amendment free speech rights were "barely implicated." *Id.* The only real loss was that of the cost advantages of bulk mailings; individual mailings of Union material were not banned. *Id.* at 130 n. 8.

First Amendment associational rights, the *Jones* court acknowledged, were more directly implicated but were still subject to a reasonableness standard. *Id.* at 132. This was a reflection of the Court's concern with the special dangers inherent in concerted group activity by prisoners.[8] The Court noted the "ever-present potential for violent confrontation and conflagration" among inmates, and the fact that "a prisoners' union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots." *Id.* at 132-33.

Unlike in *Jones,* First Amendment speech rights are directly implicated in the instant case. The right to exchange letters with another is clearly a fundamental free speech value. And the presumption of dangerousness applied by the *Jones* Court to prisoner unions loses its force in the context of mail between two inmates in two different institutions physically separated by many miles.

The other case relied upon by appellants is *Bell* v. *Wolfish,* 441 U.S. 520 (1979). There, a group of pretrial detainees contended, *inter alia,* that a regulation prohibiting the receipt of hardback books not mailed directly from publishers, book clubs, or bookstores violated the First Amendment. The receipt of paperback books, magazines, and other soft-covered materials from any source was permitted. The Court upheld the regulation, concluding it was a rational

[8]For a thorough discussion of *Jones* and other decisions pertinent to this issue, *see Abdul Wali* v. *Coughlin,* 754 F.2d 1015, 1029-33 (2d Cir. 1985).

response to an obvious security problem. *Id.* at 550. "It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings." *Id.* at 551. There was no evidence that prison officials had exaggerated their response to this security problem. *Id.*

In addition to finding the rule reasonable, the Court in *Wolfish* took an approach similar to the one in *Pell, supra,* regarding the rule as a "time, place, or manner" regulation. *Id.* at 553. Thus, the rule served the important governmental interest in security; it was content-neutral; and it left available alternative means of obtaining reading material which were not shown to be burdensome or insufficient. *Id.* at 552.

In contrast, no alternative means of communicating with inmates in other institutions were available in the instant case. While phone calls to outsiders were permitted under certain conditions, *see* Tr., Vol. V at 60-64, phone calls to other inmates within the system were prohibited. *Id.* at 62. Moreover, we do not think a letter presents the same sort of "obvious security problem" as does a hardback book. Appellants concede that the primary concern with respect to mail between institutions was the possibility of making plans for escapes, riots, and the like. Appellants' Brief at 15. Yet in the daily operation of the correspondence policy now being challenged, Earl Engelbrecht, a Renz supervisor, examined, opened and scanned the contents of all mail between inmates not on his "approved" list. *Id.* at 4-5; Tr., Vol. V at 80-81, 96-97. This task, Engelbrecht testified, took approximately one hour a day. Tr., Vol. V at 70, 96-97. Under these circumstances, and considering the core First Amendment right involved, we believe that neither *Jones* nor *Wolfish* requires application of a rational basis standard to the issue of inmate-to-inmate mail.

Our own previous decisions do not change this conclusion. In *Rogers* v. *Scurr,* 676 F.2d 1211 (8th Cir. 1982), we held

that a prison regulation prohibiting the wearing of prayer caps and robes outside of religious services was reasonable. *Id.* at 1215. We noted that, although restrictions on First Amendment rights generally should be no greater than necessary to protect the governmental interest involved, prison officials must be given wide latitude when maintenance of institutional security is at issue. The plaintiff inmates, members of the Islamic faith, were permitted to congregate five times daily for prayer, were provided the pork-free diet required by their religion, and were served the special meals of the holy month of Ramadan. *Id.* at 1213. " 'So long as the prison authorities provide the inmate with a reasonable opportunity for the exercise of his religious tenents in a form that is substantially warranted by the requirements of prison safety and order, there is no violation of the inmate's constitutional rights.' " *Id.* at 1215-16 (quoting *Sweet* v. *South Carolina Department of Corrections,* 529 F.2d 854, 863 (4th Cir. 1975)). *See also Otey* v. *Best,* 680 F.2d 1231 (8th Cir. 1982) (upholding prison regulation prohibiting inmates subject to death penalty from attending worship services with general prison population; Muslim plaintiff was allowed visits by Muslim religious leader, was provided with special diet, and had access to religious literature and broadcasts).

In both *Rogers* and *Otey, supra,* the prison rules in question were essentially regulations of the time, place, or manner in which an acknowledged First Amendment right could be exercised. In both cases, the right of free exercise of religion was not completely deprived but was merely limited to the extent necessary to conform to security needs. Alternative means were provided by which the inmates could adhere to their religious tenets.

Closer in point is our recent decision in *Gregory* v. *Auger,* 768 F.2d 287 (8th Cir. 1985). There, an inmate challenged a prison regulation prohibiting the receipt of all but first class mail while an inmate was on disciplinary detention status

(DD1). Inmates were placed on DD1 status for no longer than sixty days. *Id.* at 290. The rule was designed to make DD1 status less pleasant than being out in the general prison population, so as to deter future misconduct. *Id.* We upheld the regulation because of its temporary nature and because of the need of prison officials to " 'have available sanctions that impose incremental disadvantages on those already imprisoned.' " *Id.* (quoting *Daigre* v. *Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983)). We observed that "the Reformatory could properly have established mail policies far more restrictive than this, so long as the disciplinary withholding of mail was only to be temporary." *Id.*

In the case at bar, however, the mail restrictions were neither temporary nor disciplinary. Although past misconduct was considered by the classification/treatment team in deciding whether an inmate should be "approved" for interinstitutional correspondence, it was but one of several factors. Moreover, the chairman of the team testified that decisions on inmate-to-inmate mail were usually made before they reached the classification team; inmates would stop the superintendent or a supervisor in the hallway and receive a decision on the spot. Tr., Vol. II at 148. The *Gregory* decision teaches that a prisoner mail prohibition is a serious infringement of First Amendment liberties, permissible only in narrowly circumscribed settings such as existed there.

We conclude that the exchange of inmate-to-inmate mail is not presumptively dangerous nor inherently inconsistent with legitimate penological (sic) objectives. We therefore affirm the district court's application of the *Martinez* strict scrutiny standard and its decision finding the Renz corresponding rule unconstitutional.

THE MARRIAGE RULE

Two regulations concerning marriage are at issue. Prior to December 1, 1983, the rule ("the old rule") set out the

procedure to be followed when an inmate desired to marry. The thrust of the old rule was to place responsibility for any and all preparations upon the inmate, and to make clear that any assistance from prison officials would be secondary to the normal functions of the institution. While the rule was silent as to the giving or withholding of permission to marry, Superintendent Turner testified that he believed he had the inherent power to deny permission by virtue of Missouri statutes "which allow me to control my institution." Tr., Vol. I at 70.

On December 1, 1983, a new marriage regulation ("the 1983 rule") was promulgated. Under the 1983 rule, an inmate desiring to marry had to file a written request stating reasons for the marriage. The superintendent was given authority to approve the request "when there are compelling reasons to do so," and to disapprove the request if "the wedding would pose a threat to the security and operation of the institution." While both rules appear applicable to marriages between inmates and outsiders, the record refers only to proposed marriages between two inmates.

The district court apparently assumed that the marriage rules were intended to serve the legitimate state interests in security and rehabilitation. *Safley*, 586 F.Supp. at 594. The court held the rules unconstitutional because they were "far more restrictive than is either reasonable or essential for the protection" of those interests. *Id.* (citations omitted). The court thus effectively applied the *Martinez* standard, *see Martinez*, 416 U.S. at 413, albeit without reference to that decision. As with the correspondence regulation, appellants argue the court should have applied a reasonableness standard.

It is well settled that the decision to enter into a marital relationship is a fundamental human rights. *Zablocki* v. *Redhail*, 434 U.S. 374 (1978); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535

(1942); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). Appellants initially contend, however, that a prisoner has no right to have a marriage ceremony performed in prison. In support of this proposition, appellants cite us to *Johnson* v. *Rockefeller,* 365 F.Supp. 377 (S.D. N.Y.), *aff'd without opinion sub. nom., Bulter* v. *Wilson,* 415 U.S. 958 (1973); *Polmaskitch* v. *United States,* 436 F.Supp. 527 (W.D. Okla. 1977); and *Wool* v. *Hogan,* 505 F.Supp. 928 (D. Vt. 1981). We find this contention to be without merit.

Both *Johnson* and *Wool, supra,* determined that a restriction on a prisoner's right to go through the formal ceremony of marriage does not amount to an infringement on a fundamental right because those aspects of a marriage which make it a basic civil right—"cohabitation, sexual intercourse, and the begetting and raising of children"—are already precluded by the fact of incarceration. *Johnson,* 365 F.Supp. at 380; *Wool,* 505 F.Supp. at 932. This argument ignores the elements of emotional support and public acknowledgment (sic) and commitment which are central to the marital relationship. Moreover, it is contrary to the *Zablocki* Court's interpretation of the decision to marry as being distinct from, but equally as important as, decisions relating to procreation and other family matters.

> [T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. * * * [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

Zablocki, 434 U.S. at 386. In *Polmaskitch, supra,* the court first determined that it had no jurisdiction of the case, and then went on to decide that a prisoner has no fundamental right to marry while incarcerated. We need not give precedential value to a decision made without jurisdiction. Thus,

we hold that an inmate's decision to marry is a fundamental right protected by the Constitution. *See Bradbury* v. *Wainwright,* 718 F.2d 1538, 1540 (11th Cir. 1983).

Appellants' main argument is the same as that advanced in connection with the mail rule—that is, the district court applied the wrong legal test. They rely on *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U.S. 119 (1977), and *Bell* v. *Wolfish,* 441 U.S. 520 (1979), as well as our own decision in *Otey* v. *Best,* 680 F.2d 1231 (8th Cir. 1982). We discussed these cases *supra* and we adhere to our earlier analysis.

All three decisions involved regulations of the time, place or manner in which a particular right could be exercised, and all three regulations left open other means of exercising that right. Thus, the union materials in *Jones* could have been mailed individually to prison inmates rather than by bulk mail. 433 U.S. at 130 n. 8. The pretrial detainees in *Wolfish* were permitted to receive all soft-covered reading materials, could receive hardback books directly from publishers, book clubs and bookstores, and had access to hardback books in the prison library. 441 U.S. at 552. And the Muslim death row inmate in *Otey,* while prohibited from attending worship services with the general prison population, was allowed religious visits and services in his cell, adherence to Islamic dietary requirements, and access to Muslim literature and broadcasts. 680 F.2d at 1232.

Here, in contrast, both the old marriage rule as it was applied by Superintendent Turner and the 1983 rule on its face absolutely prevent those inmates denied permission from getting married. There are no alternative means of exercising that right. When a government-imposed regulation "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki,* 434 U.S. at 388

(citations omitted); *see also Abdul Wali* v. *Coughlin,* 754 F.2d 1015, 1033 (2d Cir. 1985) (where official action works to deprive rather than merely limit the means of exercising a protected right, judgment of prison officials must be scrutinized under the *Martinez* standard). We therefore affirm the district court's application of strict scrutiny in evaluating the marriage rules.

THE DISTRICT COURT'S FINDINGS OF FACT

Finally, appellants contend that certain of the district court's findings of fact are clearly erroneous. Fed. R. Civ. P. 52(a). We may not overturn findings of fact unless, after a review of the entire record, we are left with the definite and firm conviction that a mistake has been committed. *Pullman-Standard* v. *Swint,* 456 U.S. 273, 284 n. 14 (1982); *Aetna Casualty & Surety Co.* v. *General Electric Co.,* 758 F.2d 319, 323 (8th Cir. 1985). As to each challenged finding, appellants concede there is supporting testimony but argue that the district court gave improper weight or significance to the finding. Having thoroughly examined the record and found substantial evidence to support each finding of fact, we hold the district court's findings are not clearly erroneous.

The thrust of appellants' argument seems to be that, even assuming the findings of fact are correct and the proper legal standard was applied, the facts of this case do not warrant the conclusion that the mail and marriage rules are unconstitutional. Since the district court based its decision on the failure of the rules to meet the least restrictive alternative requirement, we take this to be an argument that the court erred in holding that the mail and marriage rules were not the least restrictive means of serving the prison officials' objectives of security and rehabilitation.

The mail rule permitted correspondence between unrelated inmates "if the classification/treatment team of each inmate deems it in the best interest of the parties involved."

While there was testimony that the question whether correspondence between two particular inmates was in their best interests was submitted to the classification/treatment team, there was other testimony indicating that in fact the team was rarely consulted. The mail room supervisor, Engelbrecht, typically rendered a decision either at the time an inmate requested permission from him or when an inmate simply went ahead and wrote a letter which was then intercepted in the mail room and diverted to Engelbrecht. The orientation booklet given to inmates on arrival at Renz stated that no correspondence between non-family inmates was permitted, apparently in the hope that inmates would be discouraged from attempting to write.

The testimony also revealed that the principal reason for refusal of inmate-to-inmate mail was the prison officials' belief that female inmates should avoid any personal relationships, friendly or romantic, with male inmates. Such relationships are detrimental to the women's rehabilitation, according to Superintendent Turner, because they may find themselves the victims of abuse which, presumably, may in turn lead them back to criminal activities. Additionally, mail was refused on the ground of security on the theory that it may contain plans for escape, violent uprisings or other illegal activities. Marriages were denied on the basis of the same protective concerns, as well as the belief that possible "love triangles" would generate violent confrontations between inmates. No specific incident of the realization of any of these concerns, involving these or any other inmates, was alleged or shown.

We agree with the district court that stopping mail and preventing marriages are not the least restrictive means of achieving these objectives. With respect to rehabilitation, efforts such as counseling, teaching of job skills to promote independence, or development of outside interests to increase the inmate's self-image and self-respect would certainly be

permissible ways to help an inmate avoid detrimental relationships without impinging on the right to exchange letters with another or the right to marry. In our view, without strong evidence that the relationship in question is or will be abusive, the connection between permitting the desired correspondence or marriage and the subsequent commission of a crime caused thereby is simply too tenuous to justify denial of those constitutionally protected rights. As to the security concerns, we think the prison officials' authority to open and read all prisoner mail is sufficient to meet the problem of illegal conspiracies. As we discussed earlier, appropriate time, place or manner regulations are also permissible. And the development of violent "love triangles" is as likely to occur without a formal marriage ceremony as with one. Refusing to permit a wedding would not necessarily prevent such confrontations.

CONCLUSION

In sum, we affirm the district court's use of strict scrutiny in evaluating the constitutionality of the inmate correspondence and marriage regulations, we hold the court's findings were not clearly erroneous, and we uphold the court's conclusion that the regulations in question are unconstitutional.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

Leonard SAFLEY, et al., and Mary Webb, et al., individually and as a class of similarly situated people, Plaintiffs,

v.

William R. TURNER, et al., and David Blackwell, et al., Defendants.

Nos. 81-0891-CV-W-6, 82-0072-CV-W-6.

United States District Court,
W.D. Missouri, W.D.

May 7, 1984.

In class action to determine constitutional status of inmate-to-inmate correspondence, visitation privileges relating to former inmates and right to marry, the District Court, Sachs, J., held that: (1) marriage and decision to enter into marital relationship involve fundamental human rights; (2) prison regulations and practices against inmate-to-inmate correspondence were unnecessarily sweeping; (3) mail censorship regulations and practices failed to provide minimum constitutional procedural safeguards against arbitrary and capricious censorship, in violation of inmates' First Amendment rights; (4) rule prohibiting former inmates from visiting prison until after they had been in nonprison setting for six months was legitimate exercise of discretion; and (5) all issues presented were sufficiently novel or unsettled so that good-faith defense could be recognized in claims of two plaintiffs against individual defendant.

Floyd R. Finch, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo., for plaintiffs.

Henry Herschel, Asst. Atty. Gen., Jefferson City, Mo., for defendants.

MEMORANDUM OPINION AND ORDER

SACHS, District Judge.

FINDINGS OF FACT

1. The Renz Correctional Institution (hereinafter "Renz") contains male and female prisoners. Most of the female inmates located at Renz are medium and maximum security level offenders. Some of the male inmate need special protection from other prisoners in Missouri penal institutions.

2. A class action has been certified to determine the constitutional status of inmate-to-inmate correspondence, visitation privileges relating to former inmates, and the right to marry. The focus of inquiry is the Renz institution, but the rights in issue are not restricted to Renz.

3. Renz has a minimum security perimeter without the added security elements, such as guard towers or walls that other maximum security units would possess. The other security institutions within the Missouri Correctional System have varying differences in perimeters, in population, and in security procedures and facilities.

4. Correspondence between inmates is supposedly regulated by divisional regulation 20-118.010(e):

> Correspondence with immediate family members or inmates in other correctional institutions will be permitted. Such correspondence may be permitted between non-family members if the classification/treatment team of each inmate deems it in the best interests of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters.

5. There have been instances where the divisional correspondence regulation has been violated. For example:

a. Letters have been stopped without notice or explanation to either the correspondent or the recipient;

b. Mail to and from persons not incarcerated has been stopped or refused on factually incorrect grounds or without legitimate justification;

c. Mail to incarcerated family members has been refused or returned without notification or explanation;

d. Mail with former inmates has been refused or returned without notification or explanation.

6. The provisions of the divisional correspondence regulation allowing the classification/treatment team of each inmate to prohibit inmate-to-inmate correspondence have not been followed at Renz. Theoretically the classification/treatment team uses psychological reports, conduct violations, and progress reports in deciding whether to permit correspondence. At Renz, however, the rule as practiced is that inmates may not write non-family inmates or receive mail from non-family inmates. The more restrictive practice is set forth in the Renz Inmate Orientation Booklet presented to each inmate upon arrival at Renz. The restrictive rule at Renz is commonly known throughout the Missouri Correctional System.

7. The Renz rule against inmate-to-inmate correspondence is enforced without a determination that the security or order of Renz or the rehabilitation of the inmate would be harmed by allowing the particular correspondence to proceed and without a determination that there is no less restrictive alternative to resolve any legitimate concerns of the Department of Corrections short of prohibiting all correspondence.

8. Inmates at most institutions in the Missouri Correctional System are permitted to correspond with inmates in most other institutions. The great restriction on inmate correspondence is practiced at Renz.

9. While there is no regulation that prohibits inmates from corresponding with persons who are not incarcerated, on at least one occasion outgoing mail to a non-incarcerated

person was returned to the inmate and delivery refused because of derogatory remarks made about prison staff members.

10. Correspondence between inmates has been denied solely on the basis of the inmate's marital status.

11. Under an unwritten rule at Renz, prior approval is required before an inmate may write to another inmate regarding legal matters. Absent this approval, inmate-to-inmate legal mail routinely is opened, stopped, and refused in violation of the Department of Corrections' written rule.

12. The Division of Corrections maintains a computer listing of each inmate's potential enemies. This listing is available to all correctional officials and accompanies the inmate on transfers from institution to institution.

13. Correspondence between inmates has been denied despite evidence that the correspondence was desired simply to maintain wholesome friendships.

14. The staff at Renz has been able to scan and control outgoing and incoming mail, including inmate-to-inmate correspondence.

15. Prior to December of 1983, the Division of Corrections operated under an inmate marriage rule, designated 20.117.050, which (a) did not obligate the Missouri Division of Correction to assist an inmate who wanted to get married, but (b) did not authorize the superintendents of the various institutions to prohibit inmates from getting married. Inmates at Renz were, however, frequently denied permission to be married.

16. On December 1, 1983, after this litigation was filed, the Division of Corrections promulgated a new regulation which placed a burden upon the inmate to provide the institution with a compelling reason to permit an inmate marriage while the inmate is incarcerated.

17. At Renz female inmates have been refused permission to marry on several occasions on the unexplained

ground that the proposed marriage was not in their "best interest," in the opinion of the superintendent. Marriage requests also have been denied because of an inmate's prior history of relationships with men.

18. Inmates in correctional institutions other than Renz and the Chillicothe Correctional Center (for women) routinely are allowed to be married upon request, assuming they otherwise satisfy Missouri's statutory requirements for marriage. Restrictions are exercised most strictly at Renz and Chillicothe. The restrictions applicable to female inmates are apparently generally motivated by "protective" attitudes.

19. The marriage of a number of inmates has been delayed or forbidden because of the pendency of this lawsuit. While this practice may have been unwisely sanctioned by defendants' prior counsel, it has the appearance of penalizing the inmate population because some inmates have chosen to litigate.

20. The current inmate marriage rule places an unreasonable burden upon the inmate to prove that there are "compelling" reasons for the marriage. The term "compelling" is not defined. Defendants, however, suggest that a reason for marriage normally would not be considered compelling unless the relationship had resulted in a pregnancy or an illegitimate child prior to the request.

21. Inmates have been informed that Renz does not permit marriages.

22. There is regular transportation between most of the correctional facilities within the Missouri System for medical, dental and transfer reasons and to transport nursing aides from Renz to the Missouri State Penitentiary. Inmates also travel for court appearances. Defendants have been able to successfully handle the security problems.

23. Renz has a regulation prohibiting visitation by former inmates for a period of six months. Regulation 618.020-(5)(D) provides that:

[t]he existence of a criminal record does not constitute a barrier to visiting privileges. Each proposed visitor shall be considered individually by the casework staff and superintendent after six (6) months on release status. Individuals on parole status and conditional release desiring to visit residents of the institution must have written approval by the parole officer prior to final decision on [sic] the casework staff and the superintendent.

24. Visitation of prisoners by former inmates is permitted after they have been in a non-prison setting for six months. While the six month period admittedly is arbitrary, in the sense that five or seven months would serve the same interest, it is based partly on the security interest of the institution and partly on the belief that it is in the best rehabilitative interest of the inmate to sever ties with the prison environment for a period of time.

25. After the six month period has passed, the former inmate is then approved or disapproved in the same manner and by the same criteria as would be applied to any other prospective visitor to the institution.

26. All visitors must be approved by a review of a written application. Unapproved visitors are not permitted entrance to Renz except under exceptional circumstances.

27. Visitation by former inmates for the purpose of attending religious meeting or self-help meetings such as Alcoholics Anonymous have been denied because of the absolute, non-discretionary application of the six month non-visitation rule.

28. Inmates have not been informed of their right to participate in a team with correctional officials in making decisions concerning the inmate's status. The "team concept" has not been described to inmates; the inmates have not been informed of their right to participate in decision-making other than as applicants.

29. Inmates have been occasionally threatened with the loss of writing privileges and visitation privileges with family members for attempting to exercise their correspondence and marriage rights.

30. Inmates have occasionally been threatened with the loss of parole and of parole privileges for attempting to exercise their marriage, correspondence, and visitation rights.

31. Inmates have occasionally been harassed and threatened if they pursue grievances in an attempt to exercise their correspondence and marriage rights.

32. Inmates have occasionally been threatened with the loss of custody of their children if they pursue their marriage rights.

33. Several of the plaintiffs and their witnesses are reasonably concerned that their testimony has made them the subject of retaliation or harassment by employees of the Department of Corrections.

34. Insofar as marriage, correspondence, and visitation are concerned the grievance process has had little, if any, effect upon a superintendent's decision. In actual practice, when an inmate writes a letter of complaint to the Director of the Division of Correction, the Director's response is written by the superintendent whose decision is the subject of complaint. When a grievance is taken to the Director, the Director's staff prepares the response without contacting the inmate, based upon information provided by the inmate's superintendent and his staff.

35. The grievance process has been occasionally interfered with by Superintendent Turner.

36. Len Safley met P.J. Watson (a female inmate) at Renz where they became friends.

37. Safley and Watson were familiar with an unwritten policy followed by Renz whereby if any male and female

inmate developed a close relationship or a physical relationship one of the two inmates would be transferred ("rolled") to another institution.

38. Shortly after a relationship between Safley and Watson had developed, and after an incident that may now be described as a noisy "lovers' quarrel," Safley was transferred to the Ozark Correctional Center at Fordland, Missouri.

39. Correspondence between Safley and Watson was denied for the reason that it was not in Watson's best interests. After Safley was transferred to the Tipton Pre-Release Center, Renz continued to refuse correspondence from Safley to Watson. The same was true after he was transferred to the Kansas City Honor Center.

40. In order to correspond with Watson, Safley opened a post office box and used a pseudonym, "Jack King." Some of the letters were received by Watson, but others were returned to "Jack King."

41. Various letters and cards mailed to Watson from Safley's mother were refused by Renz, apparently because the letter contained Safley's name or a message such as "Len sends his love."

42. Safley asked friends at the Kansas City Honor Center to write to Watson using their home addresses or post office box. All of the letters were returned, apparently for the reason that they contained greetings from Safley.

43. Watson did not receive notification that letters to her from Safley, his mother, or his friends were being returned.

44. Safley received weekend passes at the Kansas City Honor Center. He had permission from the staff of the Kansas City Honor Center to travel to Jefferson City to visit Watson. Renz denied Safley permission to visit Watson.

45. After this litigation was filed, on the occasion of a hearing for a preliminary injunction, Safley obtained a marriage license and, being accompanied by an officiating min-

ister, was permitted by the court to marry, thereby mooting the issue presented for hearing.[1]

Various additional factual issues will be referred to in the following section of this opinion, where pertinent to legal rulings.

CONCLUSIONS OF LAW

Marriage.

[1] Marriage and the decision to enter into a marital relationship involve fundamental human rights. *See Zablocki* v. *Redhail,* 434 U.S. 374, 386, 98 S.Ct. 673, 681, 54 L.Ed.2d 618 (1978). Nevertheless, "the right to marry is not unfettered." *Bradbury* v. *Wainwright,* 718 F.2d 1538, 1540 (11th Cir. 1983). While the Supreme Court has held " '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,' " it has also held that "prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell* v.

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[1]It is generally the practice of the court to encourage informal disposition of controversies. The court took into account the fact that the individuals were temporarily in federal custody, the hearing was sought in good faith, and the marriage was in compliance with Missouri law. If the court had recognized a substantial state interest in preventing the marriage, permission would, of course, have been denied. No such interest was, or has been, presented.

[2]The court is aware that model standards for prison administration would certainly not determine "the constitutional minima' ". *Rhodes* v. *Chapman,* 452 U.S. 337, 348 n. 13, 101 S.Ct. 2392, 2400 n. 13, 69 L.Ed.2d 59 (1981). Such standards may, however, be "helpful and relevant with respect to some questions." *Id.* It will be assumed that a responsible committee formulating standards would be sensitive to security interests, prisoner needs and legal issues. The problem with placing total reliance on the views of prison administrators would be their natural inclination to form opinions based on convenience, conceivable though remote security interests, financial considerations and the like. While giving due deference to such testimony, the court has an inescapable duty of striking a constitutional balance.

Wolfish, 441 U.S. 520, 545-46, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979) (quoting *Jones* v. *North Carolina Prisoners' Labor Union, Inc.,* 443 U.S. 119, 125, 97 S.Ct. 2532, 2537, 53 L.Ed.2d 629 (1977). Moreover, "[t]here must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.' " *Id.* at 546, 99 S.Ct. at 1877 (quoting *Wolff* v. *McDonnell,* 418 U.S. 539, 556, 94 St.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974)).

[2] The Missouri Division of Corrections' inmate marriage rule inconstitutionally infringes upon plaintiffs' right to marriage because it is far more restrictive than is either reasonable or essential for the protection of any state security interest, or any other legitimate interest, such as rehabilitation of inmates. *See Bradbury* v. *Wainwright,* 718 F.2d 1538 (11th Cir.1983); *Lockert* v. *Faulkner,* 574 F.Supp. 606 (N.D.Ind.1983); *Salisbury* v. *List,* 501 F.Supp. 105 (D.Nev. 1980); ABA Standard for Criminal Justice 23-8.6(a)(i) (2d ed. 1980).[2] The court disagrees with one recent decision, *Wool* v. *Hogan,* 505 F.Supp. 928 (D.Vt.1981). Chief Judge Sharp in *Lockert* adequately responds to the thrust of the *Wool* decision in his comments about the significance of marriage, even apart from the consortium aspects.

While marriage counseling may well be an important service provided by prison authorities, defendants have no right to have the last word on a personal decision of this import. Even inmates have the right to make their own mistakes.

Correspondence.

[3, 4] The court recognizes the legitimate governmental interest in the order and security of penal institutions which "justifies the imposition of certain restraints on inmate correspondence." *Procunier* v. *Martinez,* 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d (1974). Such restriants must meet two criteria before the censorship will be upheld:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.

Id. at 413-14, 94 S.Ct. at 1811. *See also* ABA Standard for Criminal Justice 23-6.1(a) (2d ed. 1980).

In the leading decision regarding the correspondence rights of prisoners the Supreme Court pointedly refrained from ruling on inmate-to-inmate correspondence. *Procunier* v. *Martinez,* 416 U.S. at 408, 94 S.Ct. at 1808 (1974). A slightly earlier Fifth Circuit decision sustained a federal policy prohibiting such a correspondence except for "members of the immediate family" and "special exceptions" sanctioned by a caseworker. *Heft* v. *Carlson,* 489 F.2d 268 (5th Cir.1973).

It has been stated that the cases have "uniformly upheld the right of prison officials to restrict inmate to inmate correspondence." *Schlobohm* v. *U.S. Atty. Gen.,* 479 F.Supp. 401, 403 (M.D.Pa.1979). There is, however, no recent appellate ruling to that effect.

An Eighth Circuit decision declines to rule that there is an "unqualified right" to forbid inmate-to-inmate correspondence. *Watts* v. *Brewer,* 588 F.2d 646, 650 (8th Cir.1978). Only a prohibition against "secret" correspondence was sustained in *Watts,* particularly because of the danger such secret and

unregulated correspondence would pose to prisoners who have been protectively isolated in another prison. A Fifth Circuit decision subsequent to *Martinez* requires careful examination of First Amendment rights of prisoners to communicate between a segregation unit and the less secure areas of a prison. *Rudolph* v. *Locke,* 594 F.2d 1076 (5th Cir.1979). A bare assertion of security interests is "not enough." 1077. *See also Stevens* v. *Ralston,* 674 F.2d 759 (8th Cir.1982) (security claims not deemed automatically controlling in justifying prohibition of correspondence between an inmate and a former prison employee).

[5] Defendants may attempt to distinguish *Rudolph* because it refers to certain highly protected subjects of communication ("literature about politics and religion") and because the communication was within a single institution rather than between institutions. Neither of these distinctions seems controlling. A segregated unit would be entitled to the highest degree of permissible security. The subject matter of communication rarely governs its protection. In accordance with *Rudolph,* and contrary to *Heft,* the court believes that the only valid constitutional rule would permit most inmate-to-inmate communications, with appropriate regulations as to openness (under the *Watts* rule) and surveillance. Double surveillance (reading at both institutions) would generally seem sufficient.

The Court notes that defendants have allowed inmates the unrestricted use of long distance telephones, apparently without surveillance. This would seem to present a security risk exceeding that here involved. Defendants' expert witness from Kansas, Sally Chandler Halford, acknowledged that, contrary to her views, Kansas permits inmate-to-inmate correspondence. While such communication is somewhat burdensome to the authorities, no pattern of security problems was developed by the witness or by other testimony. Forbidding *all* correspondence would reduce administrative burdens, but a First Amendment violation would result.

[6, 7] Even if some restriction on inmate-to-inmate correspondence can be justified, the regulations and practices at bar must fall. The prohibitions are unnecessarily sweeping. Correspondence is a sufficiently protected right that it cannot be cut off simply because the recipient is in another prison, and the inmates cannot demonstrate special cause for the correspondence. Communication, like marriage, is one of the basic human rights and should be preserved subject to whatever restrictions or surveillance is appropriate to avoid the planning of escapes, threats to inmates, criminal activity or other potential harm that may be reasonably articulated by the authorities.

[8] The mail censorship regulations and practices have been applied in an arbitrary and capricious manner infringing upon the plaintiffs' First Amendment rights. The regulations and practices fail to provide for the minimum constitutional procedural safeguards against arbitrary and capricious censorship. *Procunier* v. *Martinez,* 418 U.S. at 417-18, 94 S.Ct. at 1814.

Defendants have failed to demonstrate that the needs of Renz are sufficiently different to justify greater censorship than is applied by other well-run institutions. *See id.* 418 U.S. at 414-18 nn. 14 & 15, 94 S.Ct. at 1811-14 nn. 14 & 15; 28 C.F.R. §§ 540.10-540.22 (1982).

The court recognizes that occasional mishandling of correspondence is inevitable, and that inmate-to-inmate correspondence may have some risks slightly exceeding that of ordinary correspondence, but concludes that the institution can effectively cope with the problems through less restrictive means, such as increase scanning of the mail of potentially troublesome inmates. *Cf. United States* v. *Mills,* 704 F.2d 1553, 1560 (11th Cir.1983); *Jensen* v. *Klecker,* 648 F.2d 1179, 1182 (8th Cir.1981); *Laaman* v. *Helgemoe,* 437 F.Supp. 269, 323 (D.N.H.1977).

Visitation.

[9, 10] The court will uphold the six month visitation rule, as a matter of legitimate discretion. The rule prohibiting former inmates from visiting a prison until after they have been in a non-prison setting for six months appears to be rationally related to a proper rehabilitative interest. It does not impinge on any rights sufficiently to be ruled invalid. Inmates have no absolute constitutional right to unrestricted visitation. *See McMurry* v. *Phelps,* 533 F.Supp. 742, 764 (W.D.La.1982); *Fennell* v. *Carlson,* 466 F.Supp. 56, 58 (W.D.Okla.1978); *Laaman* v. *Helgemoe,* 437 F.Supp. at 320; *Hamilton* v. *Saxbe,* 428 F.Supp. 1101, 1110-12 (N.D.Ga.1976), *aff'd sub nom., Hamil-ton* v. *Bell,* 551 F.2d 1056, (5th Cir.1977) (per curiam).

The evidence shows that exceptions to the rule should doubtless be made, as in the case of a former inmate who wished to help in the Alcoholics Anonymous program.[3] Where there is a significant personal relationship between a present inmate and a former inmate that is not antisocial in nature, or where visitation would not tend to delay rehabilitation of the released prisoner, exceptions to the six month rule seem desirable, but will not be mandated as a matter of constitutional law.

Damages.

[11] All of the issues presented to the court are sufficiently novel or unsettled so that a good faith defense may be recognized in the claims of plaintiff Safley and Watson against the individual defendants. *See Procunier* v. *Navarette,* 434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978). While there is some evidence from which a spiteful attitude could be inferred, it is sufficiently speculative so that the individual defendants should be given the benefit of the doubt. They appear to have been carrying out their concept of

[3]Defendants' expert, Ellis McDougal, testified that he favored exceptions of this sort.

what was best for inmates Safley and Watson. Superintendent Turner's attitude did not evidence hostility. On the contrary it seemed excessively paternalistic.

[12] Even if a good faith defense were not recognized in this case, the thrust of the Safley-Watson claim is for injunctive relief, and under all the facts they should be restricted to nominal damages. *Hunter* v. *Auger,* 672 F.2d 668, 677 (8th Cir.1982). Plaintiffs have achieved their objective, and have not been subjected to harms exceeding the violation of privacy involved in the *Hunter* case.

Relief.

For all of the above reasons it is hereby

ORDERED that counsel for plaintiffs and defendants confer, negotiate and prepare a suitable decree in accordance with this opinion. The joint or several proposals of the parties should be submitted to the court within thirty days of the date of this order. It is further

ORDERED that the Safley-Watson damage claims are DENIED. It is further

ORDERED that plaintiffs' counsel, having generally prevailed on the merits of this cause, promptly submit his claim for attorneys' fees and expenses. It is further

ORDERED that defendants engage in no harassment of inmates for their participation in this lawsuit.

NO. 85-1384

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

WILLIAM R. TURNER, et al., and
DR. LEE ROY BLACK, et al., Petitioners,

v.

LEONARD SAFLEY, et al., and
MARY WEBB, et al., Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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32 pp

QUESTIONS PRESENTED

1. Whether the superintendent of a particular Missouri correctional facility may routinely prohibit adult female inmates from marrying other adults?

2. Whether officials of one Missouri correctional facility may routinely prohibit all correspondence between inmates, including completely innocent mail which does not threaten the institution's security or order?

LIST OF ALL PARTIES

Petitioners' statement as to the parties respondent is inaccurate. In addition to Leonard Safley and Mary Webb, P. J. Watson-Safley, Robert E. Thompson, Linda Scott Thompson, William Quillun, Diana Finley, Nancy Row, Judy Henderson, Shirley Lute, Connie Flowers, Patrick Barks, and Alice Garnett are all named class plaintiffs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The Court of Appeals' Opinion is reported as Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985), aff'g 586 F. Supp. 589 (W.D. Mo. 1984).

STATEMENT OF THE CASE

Petitioners' Statement of the Case is misleading insofar as it fails to acknowledge that the practices found unconstitutional by the District Court occurred almost exclusively at one Missouri prison, the Renz Correctional Center. The District Court found that inmates at most other Missouri correctional facilities are routinely allowed to be married and are generally allowed to correspond with each other. A23, A21.

In contrast, Renz inmates were informed that the institution did not permit marriages and received an orientation booklet stating that they could not write or receive mail from other inmates. Id. It is significant

that most prison administrators in this state did not impose the restrictions routinely practiced at Renz.

The previous regulations of the Missouri Department of Corrections permitted prison officials at one institution to deny, in an arbitrary and capricious manner, inmate marriages and innocent correspondence. The revised regulations in effect today -- promulgated by agreement after the District Court's order was entered -- more tightly confined Renz's ability to prohibit marriages and correspondence and simply brought Renz into line with the existing practices at other Missouri correctional facilities. Accordingly, the Court should not conclude that the District Court's

order caused massive upheaval throughout the Missouri prison system.

The second misleading aspect of the Petitioner's Statement of the Case is that it fails to acknowledge respondents' consistent position that prison authorities could place reasonable time, place, and manner restrictions upon marriage ceremonies and could read all non-privileged incoming and outgoing inmate correspondence to protect the security and order of the institutions. The issue presented to the Courts below was whether prison officials could totally prohibit inmate marriages and totally forbid all correspondence, however innocent and legitimate, between friends incarcerated at different institutions.

Petitioners also ignore the District Court's findings that officials at Renz repeatedly violated extant Department of Correction rules concerning marriage and correspondence, A21-22; that Renz stopped innocent correspondence between inmates and members of the public, A21; that inmates were harassed and threatened for attempting to exercise their correspondence and marriage rights, A25; and that the Missouri correctional system's grievance process provided no effective check upon arbitrary and capricious actions by the Renz administration. Id. They fail to mention the lower Court's factual findings that Renz's alleged concerns about the effect of marriage and correspondence

upon security, order, and rehabilitation were speculative and exaggerated. A17; A22-23; A27 and n.1; A30-31.

Finally, the Court should note that in the twenty-two months since the revised regulations were promulgated by agreement of counsel for petitioners and respondents, the Missouri Department of Corrections has never asked the lower courts to modify those regulations in any way.

REASONS FOR DENYING THE WRIT

Because the unique factual circumstances of this case justify the lower courts' decisions and limit its applicability to certain institutions of the Missouri prison system, this case does not merit this Court's attention. There is no real conflict of decisions in the Courts of Appeal and the opinion of the Court below gave appropriate deference to this Court's previous opinions. None of petitioners' arguments on the merits warrant this Court's time.

I. <u>The peculiar focus of this case on one correctional facility limits its applicability and importance</u>.

Throughout this litigation, petitioners have consistently stressed that the unique situation of Renz Correctional Center -- a minimum security institution holding most of Missouri's female offenders and certain male inmates in protective custody -- justified petitioners' conduct. The District Court found that other Missouri prisons routinely allowed inmates to correspond and marry; the greatest restrictions on those rights were practiced at Renz. A21-23, A2-6.

Many of the practices at Renz violated extant regulations of the

Missouri Department of Corrections. A20-22. Moreover, petitioners repeatedly stopped correspondence between inmates and members of the public in direct contravention of this Court's holding in Procunier v. Martinez, 416 U.S. 396, 408 (1974). A21.

For obvious strategic reasons, petitioners have submerged the fact that virtually all the complaints arose from conduct at one institution run by a paternalistic superintendent. Review of the Petition might leave the mistaken impression that the District Court's order caused widespread changes at Missouri's 12 correctional facilities; more accurately, it simply brought Renz into line with

the practices followed at other Missouri prisons.

Moreover, petitioners ignore the District Court's crucial factual findings that at Renz the mail censorship regulations and practices were applied in an arbitrary and capricious manner, A31; that the prison had dealt successfully with the security concerns arising from marriage and correspondence, A22-23; and that inmates were threatened and harassed for attempting to exercise their rights. A25. The pattern of abuse by prison officials of acknowledged inmate rights guaranteed by Department regulations itself justifies the rulings of the Courts below. This is not a case where the ultimate outcome

turned on the standard of review adopted by the Court.

On appeal, petitioners unsuccessfully challenged the District Court's factual findings. A16-18. Petitioners now ask this Court to review the findings for a second time, without supporting this request with a "very obvious and exceptional show of error." Grover Tank & Manufacturing Co. v. Linde Co., 336 U.S. 271, 275 (1949). See also Rogers v. Lodge, 45 U.S. 613 623 (1982). Petitioners' complaint about the findings is just sour grapes.

Nothing in this unusual case warrants the attention of this Court.

II. No conflict of decisions exists to justify this Court's review.

Both the District Court and the Court of Appeals carefully analyzed the opinions of this Court and other courts of appeal in considering prisoners' correspondence and marriage claims. A6-16. Both recognized the prison's interests and the need to give appropriate deference to the opinions of corrections officials. A27-28; A6-10. The Courts below concluded, however, that inmates' fundamental rights to marry and to innocent correspondence "retain the highest level of protection . . . ." A8.

Petitioners never identify direct conflict between the Court of Appeals' opinion and an opinion of this Court or another Court of Appeals. At most,

petitioners argue that the ruling of the Courts below "violates the spirit of this Court's analysis of inmates' rights in a prison setting" or "is in conflict with this Court's principles . . . ." Petition at 9, 13.

In the absence of a clear conflict, petitioners latch onto language in certain cases stressing deference to prison officials, seemingly unmindful that "judicial pronouncements derive their meaning solely by reference to the facts of individual cases." Abdul Wali v. Coughlin, 754 F.2d. 1015, 1032 (2d Cir. 1985). Petitioners all but ignore this Court's reminder "that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in

prison." Bell v. Wolfish, 441 U.S. 520, 545 (1979). See also Jones v. North Carolina Prisoner's Labor Union, Inc., 443 U.S. 119, 125 (1977).

While there is sometimes tension between inmates' assertion of constitutional rights and prison authorities' legitimate needs, the lower courts are perfectly capable of reconciling those competing interests by applying the standards articulated by the Courts of Appeal. The reasoning of cases like Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985); Abdul Wali v. Coughlin, supra, 754 F.2d at 1033; Bradbury v. Wainwright, 718 F.2d 1538 (11th Cir. 1983); Storseth v. Spellman, 654 F.2d 1349, 1355-56 (9th Cir. 1981); and Guajardo v. Estelle,

580 F.2d 748, 753-57 (5th Cir. 1978),

has been explained by Judge Kaufman:

> Our reading of the cases suggests a tripartite standard, drawn by reference to the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right. . . .
>
> * * *
>
> Where . . . the activity in which prisoners seek to engage is not presumptively dangerous, and where official action (or inaction) works to deprive rather than merely limit the means of exercising a protected right, professional judgment must occasionally yield to constitutional mandate. In these limited circumstances, it is incumbent on prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to

> effectuate the governmental objective involved.

Abdul Wali v. Coughlin, supra, 754 F.2d at 1033, citing Procunier v. Martinez, 416 U.S. 396, 413 (1974).

This discerning method of analysis harmonizes the opinions of this Court and provides a workable standard for the lower courts. Petitioners apparently do not grasp the concept, for they unfairly accuse the Court of Appeals of "attempt[ing] to limit this Court's analysis and the standard as applied in Jones v. North Carolina Prisoner's Labor Union, Inc., Bell v. Wolfish, and Pell v. Procunier . . . to only those activities which were 'inherently dangerous' and were 'inconsistent with the fact of incarceration.'" Petition at 9 (citations

omitted). They further claim the Court of Appeals "contend[ed] that it was only activities engaged in by prisoners which were 'inherently dangerous' which should be afforded the deference of the rational relation test . . . ." Id. at 12.

With all due respect, the language for which Petitioners castigate the Court of Appeals is not in its opinion. Perhaps petitioners misunderstood the Court of Appeals' conclusion "that the exchange of inmate-to-inmate mail is not presumptively dangerous nor inherently inconsistent with legitimate penalogical objectives." A12.

This Court should reject petitioners' implicit assumption that the lower courts (and, presumably, prison

officials) do not have the mental acuity to follow the careful analysis of cases like Safley and Abdul Wali. The standard adopted by the Courts of Appeal is workable and properly deferential but still protects the essence of fundamental rights such as pure speech and the marriage decision.

Not surprisingly, petitioners would prefer a simpler rule that treats all inmate claims precisely the same and incidentally allows prison administrators to do what they damn well please. The District Court recognized a higher calling:

> The problem with placing total reliance on the views of prison administrators would be their natural inclination to form opinions based on convenience, conceivable though remote security interests, financial considerations and the like.

> While giving due deference to such testimony, the Court has an inescapable duty of striking a constitutional balance.

A27, n.2.

In petitioners' view, an inmate's desire to be married or to write an innocent letter to a close friend deserves no more protection than another inmate's desire to wear prayer caps and robes outside religious services. See Rogers v. Scurr, 676 F.2d 1211 (8th Cir. 1982), cited at Petition 14, 15.

Respondents believe that the lower courts are capable of more discerning analysis. The absence of any conflict in the applicable standard compels rejection of the petition.

III. The Court below reached the correct result.

Beyond authority of any Missouri statutes or Department regulation, Superintendent Turner of Renz Correctional Center routinely denied the marriage requests of the adult inmates under his supervision, who he paternalistically called "my women." Regardless of whether they wanted to marry another inmate or a free member of the public, Mr. Turner invoked his "inherent authority" to forbid marriage to female inmates.

The rule of law also suffered at the hands of Caseworker Englebrecht, who presided over inmate correspondence. In direct contravention of the prior Department of Corrections rules

that explicitly authorized inmate-to-inmate correspondence under some circumstances, Renz's staff published and enforced a correspondence policy that prohibited virtually all Renz inmates from writing innocent letters to friends at other correctional institutions. Other correspondence regulations were frequently breached at Renz, sometimes in direct violation of Procunier v. Martinez, 416 U.S. 396 (1974).

The lower court's findings that inmates were threatened and harassed for attempting to exercise their marriage and correspondence rights were based in part on testimony that Superintendent Turner shredded an inmate's grievance before it could be submitted to his superiors and told

one plaintiff "that we could get all the court orders we wanted, but he didn't have to honor them." His disdain for the rule of law amply justified the District Court's findings.

Respondents entered into the record dozens of letters and birthday cards, both to and from inmates and to and from members of the public, which were stopped or refused by Renz officials. Respondents challenged petitioners to point to anything in the many exhibits which threatened the security or order of Renz or any other prison. That challenge went unanswered.

At trial and on appeal, petitioners speculated about the evils which could possibly flow from unbridled correspondence and rampant

inmate marriages. The trial court found the stated concerns were exaggerated. A22-23; A27; A30-31. After reviewing the evidence, the Court of Appeals concluded that "[n]o specific incident of the realization of any of these concerns, involving these or any other inmates, was alleged or shown." A17.

Petitioners continue to adopt an apocalyptic tone in this Court, rhetorically forecasting that the results of the lower Courts' rulings will be "a high price to pay for experimentation in theoretical prison management." Petition at 14.

The fevered pitch of petitioners' alleged concern seems painfully forced for three reasons. First, prior to this case most Missouri institutions

routinely allowed inmate-to-inmate correspondence. A21. Secondly, the District Court explicitly found that Missouri prisons "can effectively cope with the problems through less restrictive means, such as increased scanning of the mail of potentially troublesome inmates." A31.

Finally, petitioners and their counsel drafted correspondence and marriage regulations which have been in effect at Missouri institutions since June, 1984. They have never approached respondents' counsel or the Court with any suggestion that the rules should be substantively modified to protect the Department of Corrections' legitimate interests.

What smolders beneath the surface of this case is petitioners'

unarticulated value judgment that Renz inmates' rights to correspond and marry are simply not worth the administrative inconvenience caused by an occasional marriage and the time spent scanning inmate correspondence. They fail to explain how such inconvenience was readily accepted for years at other Missouri institutions before the practices at Renz were challenged.

At least petitioners' defense of the marriage rule is intellectually honest. They straightforwardly contend that Superintendent Turner should be allowed to substitute his judgment as to whether "his women" should be married rather than to allow his adult charges to make that decision for themselves. A17.

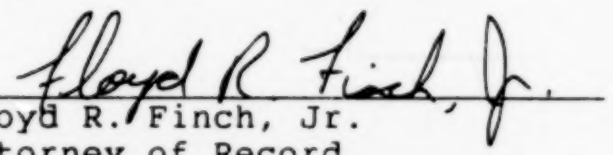
Petitioners conveniently failed to mention that the one marriage of a female inmate approved by Superintendent Turner ended in divorce a few months later. In contrast, respondents Leonard Safley and his wife -- who could only be married while in temporary federal custody on a writ of habeas corpus ad testificandum -- recently celebrated their fourth wedding anniversary.

The decisions of the lower Courts were soundly based on law, properly deferential to the needs of prison administrators, and wisely vigilant to the protection of legitimate inmate rights. Those opinions should not be disturbed.

CONCLUSION

For these reasons, this Court should deny this petition for certiorari.

Respectfully submitted,



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(3)

No. 85-1384

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, Employees of the Department of Corrections and Human Resources for the State of Missouri, *Petitioners*,

vs.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people, *Respondents*.

DR. LEE ROY BLACK; W. DAVID BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT, Employees of the Department of Corrections and Human Resources for the State of Missouri, *Petitioners*,

vs.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people, *Respondents*.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

(Counsel on Inside Cover)

Petition for Writ of Certiorari Filed February 18, 1986
Certiorari Granted May 27, 1986

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63pp

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TABLE OF CONTENTS

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*The opinions of the lower courts regarding the issues before this Court are contained in the appendix to the petition for the writ of certiorari. The District Court Opinion *Safley et al. v. Turner et al.*, 81-0891-CV-W-6, 82-0072-CV-W-6, begins at A-19 of the Appendix and is also at 589 F.Supp. 586 (W.D. Mo. 1984). The Circuit Court Opinion styled as *Safley et al. v. Turner et al.*, 84-1827, 84-2337 appears in the Appendix beginning at A-1 and is also located at 777 F.2d 1307 (8th Cir. 1985).

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CASE NO. 81-0891-CV-W-6
CASE NO. 82-0072-CV-W-6

LEONARD SAFLEY, et al., MARY WEBB, et al.,
individually and as a class of
similarly situated people,
Plaintiffs,

v.

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, EMployees of the Department of Corrections and Human Resources for the State of Missouri

and

DAVID W. BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT, Employees of the Department of Corrections and Human Resources for the State of Missouri,
Defendants.

RELEVANT DOCKET ENTRIES

October 16, 1981	Complaint [Case No. 81-0891-CV-W-6] - under the Civil Rights Act, 42, U.S.C. §1983, with forma pauperis affidavit, filed. (Provisionally filed pursuant to Court en banc Order of December 3, 1968). Acknowledgement to plaintiff, Information copy to Attorney General of the State of Missouri.
January 29, 1982	Complaint [Case No. 82-0072-CV-W-6] - under the Civil Rights Act, 42, U.S.C. §1983 with forma pauperis affidavit.

	(Provisionally filed pursuant to Court en banc Order of December 3, 1968). No distribution of copies made.
May 3, 1982	Order - mailed. (Ordered that cases 82-0072 and 81-0891 are hereby consolidated for all further proceedings).
October 5, 1983	Order - (Ordered that the plaintiffs' Motion for Leave to File Amended Complaint is Granted. Ordered that defendants' Motion to Dismiss is denied. Ordered the parties are to file witness and exhibit lists on or before 11-15-83. The parties are to meet on or before 11-30-83, produce each of their exhibits for inspection. The parties are to submit the proposed pretrial order before 11-15-83. The parties should note that it will take a most compelling reason before there will be any further extension of these deadlines. For good cause shown, plaintiff P.S. Watson-Safley's Motion for Leave to File Answers to Request for Admissions Out of Time is granted. With respect to the Motion to Compel Discovery from Defendants, the parties are directed to confer within 10 days of the date of this order in an attempt to resolve their differences and, thereafter, to notify the Court of the results of this conference.)
October 21, 1983	Answer to plaintiff's amended complaint.

February 23, 1984	Minute - sheet of first day of trial. The two cases, consolidated for trial, are called by the Honorable Howard F. Sachs. Parties announce ready. Trial is to the Court. Parties make opening statements and the plaintiff presents evidence. Trial is recessed until 9:30 a.m., Friday, 2-24-84.
February 23, 1984	Stipulations - filed.
February 23, 1984	Order - Ordered that plaintiffs' Motion to Join as Additional Party Defendants Donald W. Wyrick, Betty Bowen and Earl Engelbrecht to Case No. 82-007-CV-W-6 is hereby granted.
February 24, 1984	Minute - sheet of 2nd day of trial. Trial is resumed to the Court with testimony being continued. Trial is recessed until 9:00 a.m. in Jefferson City, Missouri.
February 29, 1984	Minute - sheet of 3rd day of trial. Trial is resumed to the Court in Jefferson City, Missouri, with testimony continuing. Trial is recessed until 8:30 a.m.
March 1, 1984	Minute - sheet of 4th day of trial. Trial is resumed to the Court in Jefferson City, Missouri, with testimony continuing. Trial is recessed until 9:00 a.m. in Kansas City, Missouri.
March 2, 1984	Minute - sheet of 5th day of trial. Trial is resumed to the Court in Kansas City, Missouri, with parties continuing testimony and rest. The matter is taken under advisement by the

	Court and all filings are due on or before March 23, 1984. Exhibits are retained with the Court's files.
March 2, 1984	Exhibit List - plaintiffs.
March 2, 1984	Exhibit List - defendants.
March 2, 1984	Exhibit List - defendants.
May 7, 1984	Memorandum Opinion and Order. (Ordered that counsel for plaintiffs and defendants confer, negotiate and prepare a suitable decree in accordance with this opinion. The joint or several proposals of the parties should be submitted to the Court within thirty days of the date of this order. It is further ordered that the Safley-Watson damage claims are denied. It is further ordered that plaintiffs' counsel, having generally prevailed on the merits of this cause, promptly submit his claim for attorneys' fees and expenses. It is further ordered that defendants engage in no harassment of inmates for their participation in this lawsuit.)
May 15, 1984	Motion - for Clarification or in the Alternative a Motion to Stay Injunction Pending Appeal - defendants, with Suggestions.
May 21, 1984	Memorandum to the Parties.
June 18, 1984	Order - Ordered that the Missouri Division of Corrections adopt the revised regulations concerning inmate

	marriages and correspondence which are attached to this order as Exhibits A and B. It is further ordered that these rules are to be posted one time on the bulletin boards or other places regularly used to notify the inmate population of the Missouri Division of Corrections of events or other prison activities.
June 27, 1984	Notice of Appeal - $70.00 paid #19290.
September 10, 1984	Order - Ordered that the Safley-Watson damage claims are denied. Ordered that defendants engage in no harassment of inmates for their participation in this lawsuit. Ordered that the Missouri Division of Corrections enforce and use the revised regulations concerning inmate marriages and correspondence which are attached as Exhibits A and B. Ordered that, unless heretofore accomplished, these rules are to be posted one time on the bulletin boards or other places regularly used to notify the inmate population of the Missouri Division of Corrections of events or other prison activities. Ordered that the plaintiffs be awarded attorneys fees in the amount of $37,309.43. Ordered that jurisdiction is retained to modify or enforce this judgment.
September 10, 1984	Clerk's Judgment - in a civil case.
October 3, 1984	Notice of Appeal - defendants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

LEONARD SAFLEY, et al., and MARY WEBB, et al., individually and as a class if similarly situated persons,	)	
Plaintiffs,	)	
	)	Case No. 81-0891-CV-W-6
v.	)	Case No. 82-0072-CV-W-6
WILLIAM B. TURNER, et al., and DAVID W. BLACKWELL, et al.,	)	
Defendants.	)	

AMENDED COMPLAINT

By their appointed counsel, plaintiffs state for their amended complaint against defendants and each of them:

1. This action arises under the First, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States and under 42 U.S.C. § 1983 (1978). Jurisdiction of this Court is based on 28 U.S.C. §§ 1331 and 1343.

PLAINTIFFS

2. Plaintiff Leonard Safley is an individual residing at 524 Booth Street, Kansas City, Missouri 64125. Plaintiff P. J. Watson-Safley is an inmate of Renz Correctional Center [hereinafter Renz], Cedar City, Missouri, and is now married to plaintiff Leonard Safley.

3. Plaintiff Robert E. Thompson is a resident of the Kansas City Honor Center, 919 Oak St., Kansas City, Missouri. Plaintiff Linda Scott is a resident of Renz. Plaintiffs Thompson and Scott desire to correspond, visit, and be married, but those rights have been infringed by defendant William Turner and other employees of the Missouri Division of Corrections.

4. Plaintiff William Quillun is a resident of the Missouri State Penitentiary. Plaintiff Diana Finley is a resident of Renz. Plaintiffs Quillun and Finley desire to correspond, visit, and be married, but those rights have been infringed by defendant Turner and other employees of the Missouri Division of Corrections.

5. Plaintiff Nancy Row is a Renz inmate whose desire to correspond with her ex-husband and friends within the Missouri Prison system has been impaired by defendant Turner and other employees of the Missouri Division of Corrections.

6. Plaintiff David Means is a resident of the Kansas City Honor Center. Plaintiff Judy Henderson is a Renz resident. Plaintiffs Means and Henderson desire to correspond, visit, and be married, but those rights have been infringed by defendant Turner and other employees of the Missouri Division of Corrections.

7. Plaintiff Shirley Lute is a Renz resident who desires to correspond with other male and female inmates of the Missouri Division of Corrections. Her right to correspond has been infringed by defendant Turner and other employees of the Missouri Division of Corrections.

8. Plaintiff Mary Webb is a Renz resident whose correspondence with her attorney, her fiancé, her cousin, and her friends has been infringed by defendant Turner and other employees of the Missouri Division of Corrections.

9. Plaintiff Connie Flowers is a resident of Renz. Plaintiff Patrick Barks is a resident of the Kansas City Honor Center. Plaintiffs Flowers and Barks desire to correspond with each other but their right to do so has been impaired by defendant Turner and other employees of the Missouri Division of Corrections.

10. Plaintiff Alice Garnett is a resident of Kansas City, Missouri. Her right to correspond with friends and acquaintenances at Renz and other Missouri penal institutions has been violated by defendant Turner and other employees of the Missouri Division of Corrections.

11. This action is brought on behalf of plaintiffs individually and as representatives of a class of (1) persons who either are or may be confined to the Renz Correctional Center and who desire to correspond with inmates at other Missouri Correctional facilities, or persons outside of the Missouri Division of Corrections; (2) persons who desire to correspond with inmates of any Missouri correctional institution whose correspondence with inmates of Missouri correctional institutions has been stopped or delayed for any reason other than an attempt to violate the extant rules of the Missouri Division of Corrections concerning correspondence; (3) persons who desire to visit or marry inmates of the Missouri Division of Corrections and whose rights of correspondence, visitation, and/or marriage have been or will be violated by employees of the Missouri Division of Corrections. This action is properly brought as a class action under Fed. R.

Civ. Pro. 23(b)(2) because the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; plaintiffs anticipate that any defenses raised by defendants will be typical of the defenses applicable to the class; the representative parties will fairly and adequately protect the interests of the class on the issues raised herein; because defendants have acted or refuse to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

DEFENDANTS

12. Defendant Lee Roy Black is the Director of the Department of Corrections and Human Resources of the State of Missouri. Defendant W. David Blackwell is the Director of the Division of Adult Institutions for the State of Missouri. In their respective capacities, these defendants are ultimately responsible for the promulgation, implementation, and enforcement of the policies of the Missouri Division of Corrections concerning correspondence, visitation, and marriage of prison inmates, and further are sworn to uphold the constitutional rights of the inmates under their supervision. These defendants have knowingly defaulted on their obligation to enforce the pertinent rules of the Division of Corrections and in their responsibility to protect the constitutional rights of inmates under their supervision. In addition, these defendants have knowingly permitted rules, customs, and practices which violate the constitutional rights of inmates to flourish within the Missouri Division of Corrections.

13. Defendant William Turner is the Superintendent of Renz and is directly responsible for the implementation

and enforcement of Department of Corrections policies concerning correspondence, visitation, and marriage at that institution.

14. Defendant Earl Englebrecht is a case worker supervisor at Renz. Defendant Betty Bowen is a case worker at Renz. Defendant Cathy Crocker is a correctional officer at Renz. In their respective capacities, these defendants are responsible for implementation and enforcement of Missouri Division of Corrections policies concerning correspondence, visitation, and marriage at Renz.

15. Defendant Larry Trickey is the Superintendent of the Ozark Correctional Center at Fordland, Missouri. Defendant Bernice Trickey is the wife of Larry Trickey and has served on the staff at Fordland. Defendants Howard Wilkins, Jim Purkett, and William F. Yeager have formerly served on the staff of the Ozark Correctional Center at Fordland, Missouri. All of these defendants have had some responsibility for enforcing Missouri Division of Corrections rules concerning correspondence at the Ozark Correctional Center.

16. Defendants have been and are engaged in a conspiracy to violate the constitutional rights of plaintiffs and the class they represent. Each and all of the acts alleged herein were done by defendants not as individuals but under the color and pretense of the statutes, regulations, customs, and usages of the State of Missouri and under the authority of their respective offices in the Missouri Division of Corrections.

CORRESPONDENCE

17. The rules of the Missouri Division of Corrections concerning correspondence recognized that

> [i]t is essential that inmates develop and maintain healthy family and community relationships. Correspondence and telephone contact with family members, close friends, and organizations are important factors in maintaining the morale of the individual and motivating positive and acceptable behavior.

18. The divisional rules provide, however, that correspondence between non-family members in different correctional institutions "may be permitted . . . if the classification/treatment team of each inmate deems it in the best interest of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters."

19. The policy concerning correspondence between non-family members is unconstitutional insofar as it gives prison authorities total discretion in deciding what is in the "best interest" of the inmates because that standard is unconstitutionally vague when applied to speech protected by the First Amendment. In addition, that meaningless standard promotes and encourages arbitrary and capricious action on the part of state officials.

20. On information and belief, correspondence between non-family members at different institutions within the Missouri Division of Correction system is permitted at all institutions with the exception of Renz. On information and belief, defendant Turner and other employees of the Missouri Division of Corrections have a pattern and practice of refusing to permit inmates of Renz to correspond with or receive letters from inmates at other correctional institutions, a situation which appears to be unique within the Missouri Division of Corrrections.

21. On information and belief, the reason given for refusing such correspondence is that Superintendent

Turner feels that correspondence between inmates is not in the best interest of any inmate. In this manner defendant Turner has violated the constitutional right of every inmate residing at Renz and any inmate who desires to correspond with an inmate residing at Renz.

22. On information and belief, defendant Turner and other employees of the Missouri Division of Corrections and at other institutions violate division policy by refusing to permit correspondence between inmates in division institutions concerning legal matters.

23. On information and belief, defendant Turner and other employees of the Missouri Division of Corrections violate division policy by reading incoming mail and by holdng it for more than 24 hours before delivering it to the inmates.

24. On information and belief, employees of the Division of Corrections have violated division policy stating that "[t]here will be no restriction as to the number of letters an inmate may receive except when clear and convincing evidence justifies limitations" in that they have restricted certain inmates to only one letter a day.

25. Inmates of Renz who have complained concerning the correspondence policies effective at Renz have been harassed and threatened with discipline for attempting to pursue legal redress concerning their constitutional rights to correspond and marry.

26. On information and belief, incoming mail from persons who are not incarcerated has been read and stopped because those persons include in their mail an innocuous message from another inmate of the Missouri Division of Corrections. Mail also has been stopped on the erroneous ground that the correspondent is incar-

cerated in another correctional institution when that was not in fact the case. Mail to attorneys and relatives also has been stopped for no apparent reason. Legal mail has been delivered to inmates with the envelope already opened in violation of Department of Corrections rules.

MARRIAGE

27. Neither Missouri state law nor Missouri Division of Corrections policy prohibits or restricts inmate marriages. Division of Corrections Policy states generally that the preparations for marriage will not be assisted by the Division and its personnel and will be done at the convenience of the institution.

28. Despite this written policy, defendant Turner refuses to permit inmates to be married at Renz even if the inmates accomplish all of the preparations themselves and arrange their own transportation.

29. Defendant Turner has arranged for the harassment and discipline of inmates who pursue their marriage plans against his wishes.

VISITING

30. The Division of Corrections policy concerning visiting acknowledges that "[v]isits by family members, friends, and community groups are important factors in maintaining inmates morale and motivation of socially acceptable behavior."

31. The Division of Corrections visitation policy is applied arbitrarily and capriciously. For example, the fiance of Nancy Row's youngest daughter was allowed to visit her on one occasion but was refused a visit on a later occasion when plans for her daughter's marriage were to be discussed.

32. Inmates at certain Division of Corrections facilities are given furloughs which would allow them tc travel to Renz or other penal institutions to visit friends and fiances and which would allow an opportunity for inmates to be married to these persons. Defendant Turner and other employees of the Division of Corrections, however, refuse to allow visits by inmates on furlough for other correctional institutions and refuse to prohibit visits for the purpose of marriage to an inmate.

33. The Division of Corrections visitation policy is unconstitutionally vague and infringes plaintiffs' rights of association guaranteed by the First Amendment in that it gives excessive discretion to prison authorities. Moreover, it has been applied in an arbitrary and capricious manner by defendants and other employees of the Missouri Division of Corrections.

34. The conduct of defendants and other employees of the Missouri Division of Corrections has deprived and continues to deprive plaintiffs of their rights of free speech and free association under the First and Fourteenth Amendments of the United States Constitution, has subjected them to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution, has deprived them of the right to marriage guaranteed them by the Ninth and Fourteenth Amendments to the United States Constitution, and also 42 U.S.C. § 1983.

COUNT I - DAMAGE CLAIMS OF PLAINTIFFS SAFLEY AND WATSON

35. Plaintiffs Leonard Safley and P. J. Watson Safley reallege and incorporate by reference paragraphs 1-34 of this Complaint.

36. The rights of plaintiffs Leonard Safley and P. J. Watson-Safley to correspond, visit, and marry were unconstitutionally infringed by the actions of defendants Turner, Engelbrecht, Bowen, Crocker, L. Trickey, Wilkins, Purkett, and Yeager prior to the time that these plaintiffs were married on March 26, 1982.

37. After the marriage of these plaintiffs, plaintiff Watson was harassed by employees of the Missouri Division of Corrections at Renz.

38. Defendants' violation of plaintiffs' constitutional rights to correspond, visit, and be married and their subsequent harassment of plaintiffs for their efforts to exercise their constitutional rights caused injury and damage to these plaintiffs in the amount of $20,000 actual damages.

39. Defendants' conduct in infringing on the rights of plaintiffs and each of them was done deliberately and intentionally and with legal malice, and therefore these plaintiffs are entitled to punitive damages in the amount of $100,000 to punish and deter these defendants and other employees of the Missouri Division of Corrections from violating the constitutional rights of inmates.

WHEREFORE, plaintiffs Leonard Safley and P. J. Watson-Safley pray for judgment against defendants Turner, Englebrech, Bowen, Crocker, L. Trickey, B. Trickey, Wilkins, Purkett, and Yeager, and each of them in the amount of $10,000 actual damages and $100,000 punitive damages, for an injunction prohibiting further violations of their constitutional rights or harassment of them for their attempts to exercise their constitutional rights, for an award of attorneys' fees pursuant to 42 U.S.C. § 1988, for their costs and expenses incurred herein, and for such other and further relief as the Court deems just and proper.

COUNT II - CLASS ACTION FOR INJUNCTIVE RELIEF AGAINST DEFENDANTS BLACK, BLACKWELL, AND TURNER

40. Plaintiffs Robert E. Thompson, Linda Scott, William Quillun, Diana Finley, Nancy Row, David Means, Judy Henderson, Shirley Lute, Mary Webb, Connie Flowers, Patrick Barks, and Alice Garnett reallege and incorporate by reference paragraphs 1 through 39 of the Complaint.

41. The rights of plaintiffs and the class members which they represent to correspond, visit, and be married and their right to be free from harassment for attempting to assert their constitutional rights, have been violated by defendants Black, Blackwell, Turner, and other employees at the Missouri Division of Corrections.

42. Plaintiffs have no adequate remedy at law and are suffering and will continue to suffer great and irreparable loss, damage, and injury, and are therefore compelled to seek injunctive relief in this Court to ensure that violation of the rights of plaintiffs and other class members be enjoined by this Court and that the Court enter a permanent injunction enjoining these violations of plaintiffs' constitutional rights, and for such other and further relief as the Court deems just and proper.

WHEREFORE, plaintiffs request that this Court grant a final injunction enjoining defendants from interfering with inmate correspondence in the absence of a legitimate and objective threat to the security of the institution, such as transmission of contraband, escape plots, forgery, fraud, or other illegal schemes; requiring revision of department policies concerning correspondence to comply with the dictates of this Court's order; enjoining violations of inmates' rights to marry once the inmates have satisfied the obligations of state law concerning marriage and have

arranged to complete the marriage ceremony at their own expense and at the reasonable convenience of prison authorities, such permission to marry not being unreasonably withheld; for the Court's order permitting visitation of inmates on furlough or weekend passes so long as those inmates do not pose an objective security threat to the institution; for an order requiring compliance of the Missouri Division of Corrections with its published policies concerning correspondence, visitation, and marriage and any revisions thereof; for an order prohibiting any officer or employee of the Missouri Division of Corrections from harassing any inmate for his attempt to assert his rights to correspondence, visitation, and marriage; for an award of attorneys' fees pursuant to 42 U.S.C. § 1988; for their costs and expenses incurred herein; and for such other and further relief as this Court deems just and proper.

/s/ Floyd R. Finch, Jr.
Floyd R. Finch, Jr. #28377
Blackwell Sanders Matheny Weary & Lombardi
Five Crown Center, Suite 600
2480 Pershing Road
Kansas City, Missouri 64108
(816) 474-5700
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by United States mail, postage prepaid, this 26th day of August, 1983, to: John C. Reed, Esq., Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

/s/ Floyd R. Finch, Jr.
Attorney

(Filed October 5, 1983)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

LEONARD SAFLEY, et al., Plaintiffs,	)	
v.	)	No. 81-0891-CV-W-6
	)	82-0072-CV-W-6
WILLIAM B. TURNER, et al., and W. DAVID BLACKWELL, et al., Defendants.	)	

MEMORANDUM AND ORDER

Pending before the Court are plaintiffs' motions for leave to file amended complaint, to compel discovery, for leave to file answers to requests for admissions out of time, and for an extension of time in which to comply with the filings contemplated by Standard Pretrial Order No. 2, and defendants' motion to dismiss.

These cases originally were filed pro se by plaintiff Leonard Safley. Floyd Finch, Jr. was requested by the Court to represent Mr. Safley in these cases on March 1, 1982 and March 5, 1982. Case No. 81-9891 is an injunction and damage action against officials of Renz Correctional Center and Ozark Correctional Center for interference with the rights of inmates to correspond, visit, and marry. Case No. 82-0072 is an injunctive action against defendants Blackwell and Black to revise the rules of the

Department of Corrections concerning correspondence, visitation, and marriage and for a mandatory injunction requiring implementation and enforcement of proper rules.

The injunctive claims of plaintiffs Safley and Watson appear to have been mooted by the marriage of Safley and Watson and the release of Safley from the custody of the Department of Corrections. To counteract the allegation of mootness of the injunctive claim, the plaintiffs seek to add additional parties as plaintiffs and to convert this action into a class action under Fed.R.Civ.P. 23(b)(2).

The defendants contend that to allow such an amendment this late in the case would consume too much time due to the need for additional discovery. Plaintiffs' counsel states, however, that he has no intention of seeking additional discovery beyond proper answers to the interrogatories and requests for production of documents filed in June of 1983. Plaintiffs' counsel believes that the defendants' fear of delay is overstated: all but one of the proposed plaintiffs are or have been inmates of the Missouri Division of Corrections and the State has a complete file on each of them; some of the additional plaintiffs have already filed grievances or written letters to the defendants concerning correspondence, visitation, or marriage; and the defendants are familiar with the plaintiffs' complaints.

The defendants also contend that the "amended complaint is for all intents and purposes a new complaint." The defendants evidently believe that this is a ruse to allow the new plaintiffs to avoid a determination by the Court of whether they are entitled to proceed in forma pauperis, receive appointment of counsel, and avoid such objections of the defendants as improper venue. Plaintiffs have adequately answered these last contentions by point-

ing out to the Court that all of the additional plaintiffs except Alice Garnett are incarcerated and have no substantial amounts of money to pay a filing fee or counsel in this case. Ms. Garnett has informed plaintiffs' counsel that she is unemployed; that she resides with her mother; and that her only income is $75 a month in food stamps and the $150 per month allotment she receives because of her son's enlistment in the Army. Plaintiffs' counsel also states that four of the additional thirteen plaintiffs are residents of Kansas City, so that venue is proper here.

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given when justice so requires." The Eighth Circuit has held that "[a]mendments should be allowed with liberality . . . and when justice so requires, even after defendant has served the moving party with a motion for summary judgment." *Chesnut v. St. Louis County, Missouri,* 656 F.2d 343, 349 (8th Cir. 1981). No unfair prejudice to the defendants from the delay is apparent here. Furthermore, the delay of two years is "an inadequate basis for denying a motion to amend." *Id.* at 349 (three years insufficient). The Court recognizes that many delays have occurred in this case, but finds that the interests of justice will be served by allowing the amendment.

The requirements of Rule 23(b)(2) are that

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief of corresponding declaratory relief with respect to the class as a whole . . . .

Without ruling on the merits of the case, the Court finds that the plaintiffs have met the requirements of Rule

23(b)(2). The Eighth Circuit previously has approved the use of Rule 23(b)(2) class actions in prison reform lawsuits. *See Holt v. Sarver,* 442 F.2d 304, 305 (8th Cir. 1971); *Jackson v. Bishop,* 404 F.2d 571, 573 (8th Cir. 1968). Moreover, plaintiffs' claims do not appear to be frivolous. *See Trudeau v. Wyrick,* slip op. Nos. 82-1817 & 82-2198 (8th Cir. Aug. 5, 1983).

The fact that the injunctive claims of plaintiffs Safley and Watson may be moot does not justify the dismissal of those claims where the substitution of new representatives can rectify the problem of mootness. *See* Wright and Miller, 7A *Federal Practice and Procedure,* Civil § 1776, at p. 42 (1972); 3B *Moore's Federal Practice* ¶ 23.40[3], at p. 23-303 (1982). Furthermore, plaintiffs' proposed amended complaint appears to have cured the possible problems of its initial conclusory nature, thus meeting the other point raised in the defendants' motion to dismiss.

Accordingly, it is hereby

ORDERED that the plaintiffs' Motion for Leave to Filed Amended Complaint is GRANTED. It is further

ORDERED that, subject to possible future modification, a class composed of the following persons is certified by the Court:

1. Persons who either are or may be confined to the Renz Correctional Center and who desire to correspond with inmates at other Missouri correctional facilities or persons outside of the Missouri Division of Corrections.

2. Persons who desire to correspond with inmates of any Missouri correctional institution whose cor-

respondence with inmates of Missouri correctional institutions has been stopped or delayed for any reason other than an attempt to violate the extant rules of the Missouri Division of Corrections concerning correspondence.

3. Persons who desire to visit or marry inmates of Missouri correctional institutions and whose rights of correspondence, visitation, or marriage have been or will be violated by employees of the Missouri Division of Corrections.

It is further

ORDERED that defendants' Motion to Dismiss is DENIED. Due to changes or additions that may be necessary because of the class certification, it is further

ORDERED that

1. The parties are to file witness and exhibit lists on or before November 15, 1983. Lists shall include all potential witnesses and exhibits except those to be used for the sole purpose of unanticipated rebuttal or impeachment.

2. The parties are to meet on or before November 30, 1983, produce each of their exhibits for inspection and agree on all exhibits for which objection will be waived as to admissibility on the ground of lack of identification.

3. The parties are to meet on or before November 30, 1983, and agree upon a proposed pretrial order containing the following:

a. a statement of the nature of the action, including a designation of the parties and a list of the pleadings raising the issues.

b. a statement of the facts and legal authority upon which federal jurisdiction is based.

c. a stipulation of uncontroverted facts.

d. a list of reservations by any party to the stipulation of uncontroverted facts.

e. a list of facts that, although not admitted, are not to be contested at trial by evidence to the contrary.

f. a list of exhibits to be offered at trial, other than those to be used for impeachment, in the sequence proposed to be offered, with a description of each sufficient for identification, and a statement of all admissions by and all issues between any of the parties as to the genuineness thereof, and the truth of relevant matters of fact set forth therein or in any legend affixed thereto, together with a statement of any objections reserved as to the admissibility in evidence thereof.

In addition, the parties are strongly encouraged, although not required, to include in the proposed pretrial order a statement of factual and legal issues remaining to be litigated.

4. The parties are to submit the proposed pretrial order on or before December 15, 1983. If agreement is impossible, separate pretrial orders should not be filed, but any disputes concerning the proposed order should be set forth in the proposed pretrial order.

The parties should note that it will take a most compelling reason before there will be any further extension of these deadlines. However, for good cause shown, plaintiff P. S. Watson-Safley's Motion for Leave to File Answers to Request for Admissions Out of Time is GRANTED. With respect to the Motion to Compel Discovery from

Defendants, the parties are directed to confer within ten (10) days of the date of this Order in an attempt to resolve their differences and, thereafter, to notify the Court of the results of this conference.*

SO ORDERED.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: 10.5, 1983.

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*The Court further suggests that the parties attempt to negotiate a consent judgment. It may be assumed that minimal constitutional standards would be somewhat liberalized by approved guidelines for the operation of penal institutions and that an acceptable order could be negotiated by reasonable counsel, proceeding in good faith. If a conference with the Court or with Magistrate Ralston might expedite disposition of this case, a request should be so made.

(Filed October 21, 1983)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISOURI
WESTERN DIVISION

LEONARD SAFLEY, et al., and MARY WEBB, et al., individually and as a class of similarly situated people, Plaintiffs,	)	
v.	)	No. 81-0891-CV-W-6
	)	82-0072-CV-W-6
WILLIAM B. TURNER, et al., and W. DAVID BLACKWELL, et al., Defendants.	)	

ANSWER TO PLAINTIFFS' AMENDED COMPLAINT

Come now the defendants by and through Attorney General John Ashcroft, and his Assistant Henry T. Herschel, and in answer to plaintiffs' amended complaint state the following:

1. Admit that plaintiffs have brought this action under the specified statutes but deny plaintiffs have stated a claim upon which relief may be granted.

2. The defendants have insufficient knowledge to admit or deny whether Leonard Safley is residing at 524 Booth Street, Kansas City, MO 65124 and therefore deny

the same. Defendants admit plaintiff P. J. Watson-Safley is an inmate within the Missouri Division of Corrections and admit said parties are married.

3. Defendants admit Robert E. Thompson is an inmate in the Missouri Division of Corrections. Defendants admit that Linda Scott is an inmate at the Renz Correctional Center. Defendants have insufficient knowledge to admit or deny whether said plaintiffs have the desire to correspond, visit and be married, therefore it is denied. The defendants deny all other allegations contained in this paragraph.

4. Defendants admit William Quillen is an inmate at the Missouri State Penitentiary and that Diana Findley is an inmate within the Missouri State Correctional system. Defendants have insufficient knowledge to admit or deny whether said plaintiffs in this paragraph have any desire to correspond, visit and be married, and therefore, it is denied. The defendants also deny each and every other allegation contained in the paragraph.

5. Defendants admit Nancy Row is an inmate within the Missouri State Correctional system. The defendants have insufficient knowledge to admit or deny whether she desires to correspond with her ex-husband and friends, therefore, defendants deny this. Defendants further deny each and every other allegation contained in the paragraph.

6. The defendants admit that David Means and Judy Henderson are inmates within the Missouri State Correctional System. The defendants have insufficient knowledge to admit or deny whether these plaintiffs desire to correspond, visit and marry and, thus, the defendants deny this. Defendants further deny each and every other allegation contained in this paragraph.

7. The defendants admit that Shirley Lute is an inmate within the Missouri State Correctional system. The defendants have insufficient knowledge to admit or deny whether she has a desire to correspond with other male and female inmates of the Missouri Division of Corrections, and thus, deny this allegation. The defendants deny each and every other allegation contained in this paragraph.

8. The defendants admit that Mary Webb is an inmate within the Missouri State Correctional system. The defendants deny each and every other allegation contained in this paragraph.

9. Defendants admit Connie Flowers and Patrick Barks are inmates within the Missouri Division of Corrections system. The defendants have insufficient knowledge to admit or deny whether these plaintiffs desire to correspond with each other, and thus, deny the allegation. The defendants also deny each and every other allegation contained in this paragraph.

10. Defendants admit that Alice Garnett is a resident of Kansas City, Missouri. The defendants deny each and every other allegation contained in this paragraph.

11. The defendants deny each and every allegation contained in this paragraph insofar as it is inconsistent with the order of the Court of October 5, 1983.

12. The defendants admit that Lee Roy Black is the director of the Department of Corrections and Human Resources of the State of Missouri. Defendants admit that W. David Blackwell is the Director of the Division of Adult Institutions for the State of Missouri. The defendants deny each and every other allegation contained in this paragraph.

13. Defendants admit that William Turner is the Superintendent of Renz Correctional Center and any actions taken by him were taken under the color of state law in relation to marriage, correspondence, and visitation rights.

14. Defendants admit that Earl Englebrecht is employed by the Missouri State Correctional Facilities as a caseworker supervisor. The defendants admit that Betty Bowen and Kathy Crocker are employees of the Missouri State Correctional System and that their actions in relation to this lawsuit concerning correspondence, visitation and marriage were taken under the color of state law.

15. Defendants admit that Larry Trickey is an employee of the Missouri Division of Corrections; that Bernice Trickey is the wife of Larry Trickey and has served on the staff at Fordland; and that Howard Wilkins, Jim Purkett and William F. Yeager have formerly served on the staff at Ozark Correctional Center. Defendants admit that any actions taken by these defendants were taken under color of state law.

16. Defendants specifically deny that they have ever engaged in a conspiracy to deny any constitutional rights of the plaintiffs. The defendants deny all the allegations contained in this paragraph except what has already been admitted.

Correspondence

17. The defendants admit that the paragraph specified appears somewhere in the rules of the Missouri Division of Corrections' Rules and Regulations.

18. The defendants admit that correspondence concerning legal matters is permitted within the Division of

Corrections of the State of Missouri. The defendants further admit that division personnel heads have discretion in the regulation of other correspondence.

19. The defendants deny each and every allegation contained in this paragraph.

20. The defendants deny each and every allegation in this paragraph.

21. The defendants deny each and every allegation contained in this paragraph.

22. The defendants deny each and every allegation contained in this paragraph.

23. The defendants deny each and every allegation in this paragraph.

24. The defendants deny each and every allegation contained in this paragraph.

25. The defendants deny each and every allegation in this paragraph.

26. The defendants deny each and every allegation in this paragraph.

MARRIAGE

27. The defendants deny each and every allegation in this paragraph.

28. The defendants deny each and every allegation in this paragraph.

29. The defendants deny each and every allegation in this paragraph.

VISITING

30. The defendants admit that the quoted language is in the rules and regulations of the division of corrections.

31. The defendants deny each and every allegation contained in this paragraph.

32. Defendants deny each and every allegation contained in this paragraph.

33. The defendants deny each and every allegation contained in this paragraph.

34. The defendants deny each and every allegation contained in this paragraph.

Count I Damages Claims of Plaintiffs Safley and Watson

35. Defendants reallege their answers to paragraphs 1-34 of plaintiff's amended complaint as if more fully set forth herein.

36. The defendants deny each and every allegation contained in this paragraph.

37. The defendants deny each and every allegation contained in this paragraph.

38. The defendants deny each and every allegation contained in this paragraph.

39. The defendants deny each and every allegation contained in this paragraph. The defendants further deny that plaintiffs are entitled to relief as specified in plaintiffs' prayers for relief contained under plaintiffs' Count I.

Count II—Class Action for Injunctive Relief Against Defendants Black, Blackwell, and Turner

40. The defendants reallege their answers to paragraphs 1-39 of plaintiff's amended complaint as if more fully set forth herein.

41. The defendants deny each and every allegation contained in this paragraph.

42. The defendants deny each and every allegation contained in this paragraph. The defendants further deny that plaintiffs are entitled to relief as requested in plaintiffs' prayers for relief contained under plaintiffs' Count II.

43. Further, the defendants affirmatively state the following defenses pertaining, as they are applicable, to both of the plaintiffs' counts:

FIRST DEFENSE

Plaintiffs and plaintiffs' class have failed to state a cause of action against the defendants upon which relief can be granted.

SECOND DEFENSE

Defendants have at all times conducted themselves in good faith and in the reasonable belief that their actions were constitutional in the treatment of the plaintiffs or the plaintiffs' class and, are therefore, immune from monetary damages.

THIRD DEFENSE

The defendants' regulations concerning visitation, marriage and correspondence are justified by the needs of correctional institution's security and the legitimate rehabilitative interests of the State.

FOURTH DEFENSE

The restrictions on visitation, marriage and correspondence do not rise to a constitutional violation because they do not unnecessarily withdraw, or limit the privileges and rights to which plaintiffs are entitled to while incarcerated within the penal system.

WHEREFORE, for the foregoing reasons, the defendants request this Court to dismiss this action and that costs be taxed against the plaintiffs and the defendants receive whatever relief the Court deems just and proper under the circumstances.

Respectfully submitted,

John Ashcroft
Attorney General
/s/ Henry T. Herschel
Henry T. Herschel
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321
Attorneys for Defendants

RELEVANT REGULATIONS OF DIVISION OF CORRECTIONS

Title 13 - DEPARTMENT OF SOCIAL SERVICES

Division 20 - Division of Corrections

Chapter 18 - Mail and Visiting

20-118.010 Inmate Mail and Telephone Calls

PURPOSE: It is essential that inmates develop and maintain healthy family and community relationships. Correspondence and telephone contact with family members, close friends, and organizations are important factors in maintaining the morale of the individual and motivating positive and acceptable behavior.

(1) Outgoing Mail

(A) There will be no restriction as to the number of persons to whom an inmate may write.

(B) There will be no restriction as to the number of letters an inmate may mail.

(C) Outgoing letters will not be sealed by the inmates before they are placed in the box or other pickup point for delivery to the mailroom, with the exception of letters to judges, courts, any elected state and federal officials, officials of confining institutions, division and department administrative officals, parole board members, attorneys, and the media. All letters may be inspected in the mailroom and examined for contraband, escape plots, forgery, fraud, and other schemes, when clear and convincing evidence justifies such actions. Letters to judges, courts, elected state and federal officials, division

and department administrators, parole board members, attorneys, media representatives can be inspected only in the presence of the inmate correspondent. Outgoing mail shall not be held for more than twenty four hours before disposition. Correspondence containing contraband shall be confiscated with a receipt forwarded to sender and addressee.

(D) Letters must have the proper amount of postage affixed when forwarded to the mailroom for mailing. Letters with insufficient postage will be returned to the inmate with a memorandum stating the amount of postage required.

(E) Correspondence with immediate family members who are inmates in other correctional institutions will be permitted. Such correspondence may be permitted between non-family members if the classification/treatment team of each inmate deems it in the best interest of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters.

(G) If an inmate does not wish to receive mail from in individual, correspondence will be terminated and the inmate will be so informed by the classification/treatment team. Correspondence will not be resumed with the individual unless requested by the inmate. Parents or guardians may request termination of correspondence with an inmate from persons under the age of eighteen years.

(H) All letters are mailed upon the request of the inmate, who must assume personal responsibility for the contents. Writing threatening or obscene letters, using the mail for extortion, obtaining money by fraudulent means, and/or soliciting shall result in disciplinary action,

as well as possible prosecution for any violation of the U.S. postal regulations. Any violations may be turned over to the appropriate law enforcement agency for possible prosecution. The adjustment committee may recommend inmates found guilty of the aforementioned violations be required to adhere to approved mailing lists.

(I) Manuscripts for publication may be submitted within reasonable limits. Inmates may not enter into contractual agreements with publishers that involve a commitment for a regularly published column. Paper needed for manuscripts will either be made available in the inmate canteen or will be available for purchase from outside sources.

(2) Incoming Mail

(A) Incoming mail will not be read, and will not be held for more than twenty four hours before being delivered to the inmates.

(B) Letters from judges, courts, elected state and federal officials, officials of confining institutions, division and department administrators, parole board members, attorneys, and media representatives may be delivered to the inmate unopened, based on the return address on the outside of the envelope. Any letter in this privileged category of a suspicious or doubtful nature may be opened and inspected in the presence of the inmate to whom the mail is addressed.

(C) Regular incoming mail will be opened for inspection for contraband, and for money orders, checks, or currency to be placed on the inmate's account. Incoming letters containing contraband will be confiscated with written notification sent to the inmate to whom the letter is addressed.

(D) There will be no restriction as to the number of letters an inmate may receive except when clear and convincing evidence justifies limitations.

(E) Inmates may not receive packages except on special occasions, and all packages will be inspected. Packages wil not be accepted unless mailed by the vendor, although exceptions may be made on an individual basis when specific circumstances warrant it. Packages from the vendor containing hobby or craft materials may be exceptions from this restriction as authorized by the institution head.

(3) Possession of Letters When Entering Institutions: When an inmate enters an institution, whether received from a county jail, through interstate transfer, or transferring from one institution to another, the following guidelines shall apply.

(A) The inmate shall be permitted to retain a reasonable number of letters in his possession. These shall be inspected for contraband either at the time he enters the institution or as soon as possible thereafter. In such cases, they shall be returned to the inmate as soon as possible.

(B) An unreasonable quantity of letters shall be sent to an address given by the inmate, detroyed, or placed in the inmate's personal property, as desired by the inmate.

(C) All letters of a legal nature concerning an inmate will be retained by the inmate if so desired.

(4) Incoming Publications:

(A) Pornographic publications are not acceptable. For our purposes, pornography means pictures or literature than concern themselves with sadism, behavior of a perverse nature, any type of sexual action. Not prohibited are publications with a large national circulation which are sold openly in neighborhood drugstores and newstands, i.e., Playboy, Penthouse, etc.

(B) A reasonable limit will be placed on the number of publications an inmate may retain and exhibit in quarters. If these publications are displayed, they will be in a location that will not be offensive to the general population or public.

(C) Publications which promote violence or disorder and would affect the good order of the institutions shall be excluded. This includes but is not limited to manuals dealing with the design and production of weapons.

(5) All inmates defined as indigent by the division rules will receive writing paper, five envelopes, and five stamps a month.

(6) All mail will be forwarded to inmates who are tranferred to other institutions. Mail will be forwarded to inmates who are released providing a forwarding address is available. If a forwarding address is not available, the mail will be returned to sender.

(7) Each institution will establish procedures whereby inmates will have access to telephone facilities. These telephones may be used by all inmates except those in the reception area or disciplinary segregation.

Each institution head will develop an institutional rule based on the guidelines of this division rule and submit a copy to the division director for approval prior to implementation.

Auth: sections 216.020 and 216.115 RSMo (1978).

Original rule effective November 1, 1980.

/s/ W. David Blackwell
W. David Blackwell, Director

Title 14 - DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES

Division 20 - Division of Adult Institutions

Chapter 18 - Mail and Visiting

618.012 Inmate Mail

PURPOSE: Correspondence with members of an inmate's family, close friends, associates, and organizations is beneficial to the morale of all confined persons and may form the basis of good judgement in the institution and in the community. It will be encouraged and supported.

(1) Outgoing Mail: There will be no restrictions as to the number of correspondents to whom an individual may write.

(2) There will be no restrictions as to the number of letters an individual may mail.

(3) All outgoing letters will not be sealed by the individual before they are placed in the box or other pickup point for delivery to the mail room with the exception of letters to judges, courts, elected state and federal officials, officials of confining institutions, Division of Corrections Administrative officials, Parole Board, attorneys and the media. All other letters may be examined in the mail room for contraband, escape plots, forgery, fraud, and other schemes, if there is evidence to justify this action.

(4) When a bank draft is requested, a "green check" will be placed in the unsealed envelope and deposited in the Renz mail box. The official who placed the draft within the envelope will seal it for mailing.

(5) (A) Letters must have the proper amount of postage affixed when sent to Renz mail room. Any letter without correct return address will not be mailed. All outgoing resident mail must have the inmate's correct name, register number and the address of Renz Correctional Center in the upper left hand corner of the envelope.

(6) Correspondence with inmates in all correctional facilities will be permitted if they are immediate family members. Such correspondence may be permitted between non-family if the Classification/Treatment Team of each party deems it in the best interest of the parties involved. This applies to outgoing and incoming mail.

(7) Correspondence between inmates in different institutions within the Department of Corrections will be permitted concerning legal matters.

(8) If a correspondent does not wish to receive mail from an individual, it will be terminated and the inmate will be so informed by the Classification/Treatment Team. Correspondence will not be resumed with the individual unless the team is shown it is desired by the individual. In case of correspondent under the age of 18 years, the parent or guardian may terminate the correspondence.

(9) All inmates must resume personal responsibility for the contents of each letter deposited. Threats, extortion, etc., may result in prosecution for violation of U.S. Postal regulations. Any violations may be turned over to the appropriate law enforcement agency for possible prosecution.

(10) Manuscripts for publications may be submitted with reasonable limits. Inmates may not enter into contractual agreements with publishers that involve a commitment

for a regularly published column. Paper needed will be made available in the Inmate Canteen or can be purchased from outside sources if deemed necessary.

(1) Incoming Mail:

(A) Incoming mail will not be read; however if the Superintendent or his designate feel there is a possibility of escape plot, fraud, or other scheme, incoming mail will be examined.

(B) There is no limit on the amount of letters an inmate may receive.

(2) All incoming mail must be properly addressed with the inmates committed name, reigster number and dormitory.

(3) Inmates may receive mail only in the name he/she was incarcerated. Mail received under any other name will be returned.

(4) (A) Money order from ex-offenders will be accepted *only* if they are immediate family members.

(B) Except as outlined in #8, incoming mail will be opened for inspection for contraband, and for money orders, checks or currency. If in the opinion of the Superintendent or his designate, it is necessary to reject an incoming letter because it contains contraband, the inmate to whom the letter is addressed will be notified by written memo of the rejection and reason thereof. Contraband will be returned to addressee or turned over to law enforcement authorities. The inmate may challenge this by way of the inmate grievance procedure.

(5) Only U.S. postal money orders and money orders from banks and savings and loans will be accepted. All

other negotiable instruments and currency will be returned.

(6) All money orders must be made payable to; Treasurer, Missouri State Penitentiary. The name and register number of the inmate for whom the money order is sent must appear in the lower left hand corner of the money order if no place is provided. Any money order not in this form will be returned.

(7) All money orders received through the mail room will be forwarded to the Treasurer's office on a weekly basis.

(8) Letters to Judges, central office personnel, members of the Parole Board, attorneys and members of the media may be delivered to the inmate unopened. This decision will be made on the return address on the outside of the envelope. If, in the opinion of the Superintendent or his designate, any letter in this privileged category is of a suspicious or doubtful nature, it may be opened, but not read, in the presence of the inmate to whom the mail is addressed.

(9) Inmates will be responsible for all changes of address. Mail not forwardable will be forwarded via inside mail maximum of 30 days. If the inmate leaves address upon release, the mail room will forward all outside mail.

(10) Incoming publications will be defined as newspapers, magazines and books.

(A) Pornographic publications are not acceptable. Pornography means pictures or literature than concern themselves with sadism, behavior of a perverse matter, any type of sexual action. Not prohibited are publications with a large national circulation sold openly on newstands.

(B) A reasonable limit will be placed on the number of publications an individual may retain and exhibit in quarters. If publications are displayed, they will be done so in manner so as not to be offensive to the staff and public.

(C) Publications which promote violence or disorder, and would affect the good order of the institution, shall be excluded. This includes, but is not limited to, manuals dealing with the design and production of weapons.

(D) All publications must come from the publisher or vendor.

(11) Inmates will not receive packages except on specified dates, as will be posted at appropriate times. Packages will not be accepted unless mailed from vendor. (Exception 11A)

(A) A new reception may receive one package of *clothing* from home within 45 days of date received. Any inmate within 30 days of release may receive one outfit from home, which will be stored for him/her until date of release.

(B) Any item sold in the inmate canteen is not acceptable. Likewise, if any particular of an item is sold in the inmate canteen, the item is unacceptable.

(C) Any unacceptable item contained in a package will result in the entire package being rejected. Disposition of contents will be the responsibility of the inmate. Articles held over 60 days will be disposed of by the institution.

(D) Any package not from a vendor (with the exception of A above) will be returned unopened.

(E) If it is necessary to reject any package, the inmate to whom the package was addressed will be notified by written memo of the rejection and the reason therefore.

(F) Any package received after a specified cut-off date will be returned unopened.

(G) The inmate will be notified as to the time his/her package may be picked up.

(H) Acceptable packages will be itemized by the mail clerk and must be signed for by the inmate. Discrepancies must be brought to the disbursing agent prior to accepting the package.

(I) The mail clerk will be fully empowered to use his/her discretion in deciding the acceptability of items where questions arise.

(J) Packages containing hobby craft items are exceptions; however, they will have prior approval of the Office of Assistant Superintendent.

(12) Possession of Letters When Entering Renz: The inmate will be permitted to retain a reasonable number of letters in his/her possession. These shall be inspected for contraband when he/she enters Renz Correctional Center or shortly thereafter. In such case, they shall be returned to the inmate as soon as possible. Any quantity of letters not compliant with the above section shall be sent to an address to be named by the inmate, destroyed or placed in his/her personal property. The inmate shall indicate which disposition he/she desires. All letters of a legal nature may be retained by the inmate.

(13) Mail Pickup and Delivery: Outgoing mail will be sent out and incoming mail distributed once daily with the

exception of Saturday, Sunday and legal holidays. Due to the volume, packages, during the specified times, will be distributed as soon as possible. Failure to abide by mailing regulations may result in disciplinary action.

Original rule 11/1/76

Revised 8/15/79

Revised 10/29/80

Revised 5-10-82

Efective date

/s/ William R. Turner
William R. Turner, Superintendent
Renz Correctional Center

TITLE 13 - DEPARTMENT OF SOCIAL SERVICES

Division 20 - Division of Corrections

Chapter 17 - Inmate Rules

20-117.050 Inmate Marriage Rule

PURPOSE: This rule is promulgated to set out the procedure to be followed when an inmate of the division proposes to marry while incarcerated in one of the institutions.

(1) The Missouri Division of Corrections and its institutions are not obilgated to assist an inmate or inmates who want to be married while incarcerated.

(2) Since preparation for marriage involves manpower and manhours, the time allocated to this function shall be secondary to the functions of the institution.

(3) When an inmate proposes to marry a person who is not incarcerated, it shall be the responsibility of that person to obtain all necessary applications and have them completed. When an inmate proposes to marry another inmate, any and all preparations will have to wait until the institution head determines that it has the manpower to assist in the preparation.

(4) The institution will cooperate with the inmate by assisting in having blood tests made through the Missouri Division of Health as required by law.

(A) Since time is not of the essence, if the blood tests cannot be taken at the institution, the inmate will have to wait until the institution head decides if the institution can provide the manpower to further assist in this function.

(4) (B) The division nor its institutions is responsible for any preparations that have to be made prior to being married. The preparations shall be the responsibility of the inmate or inmates involved and their respective partners.

Auth: Section 216.020 and 216.115 RSMo.

Effective: October 1, 1978

/s/ Donald R. Jenkins
Donald R. Jenkins, Director

TITLE 13 - DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES

Division 20 - Division of Adult Institutions

Chapter 17 - Inmate Rules

20-117.050 Inmate Marriage Rule

PURPOSE: This rule is promulgated to set out procedures to be followed when an inmate of the division requests to be married while incarcerated in one of the institutions.

(1) An inmate requesting to be married shall file a written request with the superintendent of the facility in which he/she resides. This request shall state the reasons for the marriage.

(2) The superintendent may approve the marriage of an inmate when requested when there are compelling reasons to do so.

(3) The superintendent may disapprove a marriage ceremony in the institution if it is determined that the wedding would pose a threat to the security and operation of the institution. If the superintendent approves a wedding ceremony in the institution this wedding will be private with no attending publicity.

(4) No appropriated government funds will be used for an inmate marriage. However, the superintendent may allow the Chaplain to be available to assist in a wedding ceremony. Each institution head will develop an institutional rule based on these guidelines and submit a copy to the division director for approval prior to implementation.

Auth: Section 216.020 and 216.115 RSMo.

Effective: October 1, 1978

Revised rule effective date: December 1, 1983

/s/ Lee Roy Black
Lee Roy Black, Ph.D., Director Department of Corrections and Hunan Resources

/s/ W. David Blackwell
W. David Blackwell, Director Division of Adult Institutions

Title 14

DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES

Division 20 - Division of Adult Institutions

Chapter 17 - Inmate Rules

617.030 Inmate Marriage Rule

PURPOSE: This rule is promulgated to set out the procedure to be followed when an inmate of Renz Correctional Center proposes to marry while incarcerated.

(1) When an inmate proposes to marry the inmate will discuss the matter with their caseworker.

(2) It will be the responsibility of both parties involved to prove eligibility for this marital contract, to avoid bigotry on the part of either or both individuals involved.

(3) When an inmate proposes to marry a person who is not incarcerated, it will be the responsibility of that person to obtain all necessary applications and have them completed.

(4) Preparation for marriage involves an element of time which is considered secondary to the normal activities of the Institutions operation, because of this the Institution will not be responsible for any preparation that has to be made prior to the marriage. All preparations will be the responsibility of the inmate or inmates involved and/or their respective partners.

(5) No inmates at Renz Correctional Center may marry another inmate which both are confined in the institution.

(6) When two inmates enter the Department of Corrections legally married they will not be permitted to reside together at the Renz Correctional Center facility.

Because of the primary purpose of the institution, and its security responsibility to the community, all finalized plans will be submitted in writing to the institution head for approval.

The institution reserves the right to alter plans when the activity jeopardizes security of the institution.

Effective date: August 16, 1982

/s/ William R. Turner
William R. Turner, Superintendent
Renz Correctional Center

Title 13 - Department of Social Services

Division 20 - Division of Corrections

Chapter 18 - Mail and Visiting

20-118.010 Inmate Mail and Telephone Calls

PURPOSE: This rule establishes guidelines for the regulation of inmate mail and telephone contacts.

(1) There shall be no restrictions on the person to whom an inmate may write or the number of letters an inmate may mail.

(A) All mail of inmates assigned to an institution shall be processed through an institutional mailroom. Regular outgoing inmate mail shall be delivered to the institutional mailroom or designated mail pick-up point unsealed. All such mail will be subject to examination for unauthorized items, threats to institutional security or the safety of employees or inmates and evidence of illegal activity when there is probable cause to justify the examination.

(B) Privileged outgoing mail shall be letters to judges, courts, elected government officials, departmental and divisional administrators, parole board members, attorneys, co-defendants and media representatives. Privileged mail may be delivered to the mailroom or pick-up point sealed, and may be examined only in the presence of the sending inmate.

(C) Examination and forwarding of outgoing inmate mail will be completed within twenty-four (24) hours of receipt by the institutional mailroom.

(D) Outgoing mail with insufficient postage will be returned to the sending inmate with the requested postage noted.

(E) Any unauthorized article or substance found in outgoing inmate mail will be confiscated, and a conduct violation report for Contraband will be issued on the sending inmate.

(F) Inmates shall be held responsible for correspondence contents. Conduct violation reports shall be issued if evidence of violations of divisional rules is found during correspondence examination. Evidence of violations of state or federal law shall be referred to the appropriate law enforcement agency. Correspondence containing evidence of law or divisional rule violations shall be confiscated.

(G) If an individual does not wish to receive mail from an inmate, correspondence will be terminated and the inmate will be so informed by the classification/treatment team. Correspondence will not be resumed with the individual unless requested by the individual. Parents or guardians may request termination of correspondence with an inmate from persons under the age of eighteen years.

(2) There shall be no restrictions on the persons from whom an inmate may receive mail or the number of letters an inmate may receive.

(A) Privileged incoming mail shall be letters from judges, courts, elected government officials, departmental and divisional administrators, parole board members, attorneys, co-defendants and media representatives. Privileged mail shall be identified by the return address on the outside of the envelope, and shall be delivered to the inmate addressee unopened. Privileged mail may be opened and inspected in the presence of the receiving inmate if there is reasonable cause to suspect the outside return address is false.

(B) Regular incoming mail will be opened in the mailroom and inspected for unauthorized articles or substances and money orders, checks, or currency. All incoming mail will be subject to examination for threats to institutional security or the safety of employees or inmates and evidence of illegal activity when there is probable cause to justify the examination. Unauthorized articles or substances will be confiscated, and a written notice of the confiscated items placed in the correspondence delivered to the inmate. Money orders, checks, and currency will be forwarded to the institutional business office and added to the inmate's account. A receipt for the received funds will be placed in the correspondence delivered to the inmate.

(C) Incoming mail from inmates of other correctional facilities and persons under the supervision of the Department of Corrections and Human Resources will be subject to examination for unauthorized articles and substances, threats to institutional security and safety, and evidence of illegal activity. Any information concerning institutional security and safety or illegal activities will be forwarded to the appropriate correctional facility or law enforcement officials.

(D) Incoming mail will be examined and delivered to the receiving inmate within twenty-four (24) hours of receipt by the institutional mailroom.

(3) Institution heads may designate special occasions or periods of time in which inmates may receive packages by mail. Unless otherwise specifically authorized by the institution head, incoming packages shall be mailed directly from a commercial vendor. All packages will be opened in the mailroom and inspected for unauthorized articles or substances.

(4) Inmates shall not subscribe to or receive publications which promote violence, disorder, or the violation of state or federal law. Any publication which provides technical information on the design, construction, or use of any instrument or device which could endanger institutional security or safety shall also be prohibited. The institution head or his designee shall determine the acceptability of incoming publications.

(5) Inmates shall be notified in writing by the mailroom staff of the non-delivery of any incoming mail addressed to them, and of the refusal to mail any outgoing mail from them. When incoming mail is not delivered the correspondent is also to be notified in writing. The reasons for the non-delivery or the refusal to mail and the disposition of the affected correspondence will be provided in writing.

(6) Inmates shall not enter into credit agreements or installment purchase arrangements by mail.

(A) Any outgoing inmate correspondence involving purchases on credit, billing after delivery, or payment on delivery arrangements will be so identified by institutional mailroom staff and returned to the sending inmate.

(B) Incoming payment on delivery correspondence to inmates will be refused by the institutional mailroom.

(C) Incoming merchandise with accompanying bills for payment will be held in the institutional mailroom. The vendor will be advised by mail that such a procedure is not permitted, and that merchandise received will be returned to the sender upon receipt of adequate return postage. If return postage is not received from the vendor within thirty (30) days of mailing of the notification, the merchandise will be donated to a local charity.

(7) Inmates shall be permitted to retain a reasonable number of personal letters and publications.

(A) If the number of letters and publications retained by an inmate creates a fire hazard or interferes with institutional operations, excess letters and publications will be destroyed, placed in the inmate's stored personal property, or mailed at inmate expense to an address designated by the inmate, as desired by the inmate.

(B) All letters of a legal nature concerning an inmate may be retained by that inmate.

(C) A reasonable number of letters and publications in the possession of an inmate entering an institution will be inspected for unauthorized articles or substances and returned to the inmate within twenty-four (24) hours. Excess letters and publications will be disposed of as requested by the inmate.

(D) Publications in an inmate's possession will not be displayed in such a way as to be offensive to other inmates or staff.

(8) Mail will be forwarded to inmates transferred within the division. Mail will aso be forwarded to released inmates who have left forwarding addresses with the institutional mailroom. Mail addressed to released inmates who have left no forwarding address will be returned to the sender.

(9) All inmates defined as a indigent by the division rules will receive writing paper, five envelopes, and five stamps a month.

(10) Access to outgoing telephone communications shall be available to all inmates except those in reception units and those assigned to an adjustment unit. Access shall be

limited only by the availability of facilities and staff supervision. Inmate telephone facilities will be installed in such a manner so that inmate telephone calls can be made at no cost to the institution. Inmate telephone calls at institutional expense will be made only upon authorization of the institution head or designee.

Each institution head will develop an institutional rule no more restrictive than the guidelines of this divisional rule and submit a copy to the division director for approval prior to implementation.

Auth: sections 217.040 and 217.155, RSMo (Supp. 1983).

Original rule effective November 1, 1980.

Revision effective June 15, 1984.

Title 13 - Department of Social Services

Division 20 - Division of Corrections

Chapter 17 - Inmate Rules

20-117.050 Inmate Marriages

PURPOSE: This rule establishes guidelines for inmate marriage ceremonies within the Division of Adult Institutions.

(1) Inmates will be permitted to marry the spouse of their choice. The plans for the ceremony may be regulated by the institution head to protect the security or operation of the institution.

(2) Any inmate requesting marriage while assigned to an institution shall submit a written request to the institution head at least thirty (30) days prior to the proposed marriage. The request shall include the name of the prospective marriage partner, the proposed date of the marriage, and the names of the proposed marriage ceremony guests. The institution head may request the name and credentials of the person who will perform the ceremony. Verification of the official's credentials may be required.

(3) The institution head or designee may adjust the proposed date, time, and attendance of the ceremony as deemed necessary to maintain institutional security and orderly operations. The inmate shall be advised of any changes in ceremony plans, and may appeal such changes through established inmate grievance procedures. The ceremony shall be held on the date requested by the inmate unless there are compelling reasons for a change of the date.

(A) The marriage ceremony shall be supervised by an assigned institutional staff member, and shall take place during regular visiting hours.

(B) The ceremony shall take place in a secure area not accessible to other inmates. Guests shall not have contact with other inmates. Inmates who attend the wedding must be approved by the institution head or his designee.

(C) Ceremony guests shall be on the inmate's approved visiting list. The number of guests in attendance may be limited for security and/or because of availability of space.

(D) Institutional security regulations concerning phototographs, food, and authorized items shall apply to marriage ceremony participants and guests.

(4) The securing, completion and timely submission of all necessary applications and forms shall be accomplished by the inmate and his/her prospective marriage partner.

(5) No division funds will be directly expended for an inmate marriage ceremony and institutional staff will not participate in the marriage ceremony. The institutional chaplain may, however, conduct the ceremony if requested, and if approved by the institution head.

(6) In the event that inmates of different institutions wish to marry, each shall submit a request to the appropriate institution head. Marriage ceremony arrangements, preparations and any necessary transportation shall be by mutual agreement of the institution heads or their designees. The marriage ceremony shall be subject to the same limitation and conditions as those imposed on an inmate to non-inmate marriage ceremony.

Each institution head will develop an institutional rule no more restrictive than the guidelines of this divisional rule and submit a copy to the division director for approval prior to implementation.

Auth: sections 217.040 and 217.155, RSMo (Supp. 1983).

Original rule effective October 1, 1978.

Revision effective December 1, 1983.

This revision effective June 1, 1984.

No. 85-1384

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, Employees of the Department of Corrections and Human Resources for the State of Missouri, *Petitioners,*

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people, *Respondents.*

DR. LEE ROY BLACK; W. DAVID BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT, Employees of the Department of Corrections and Human Resources for the State of Missouri *Petitioners,*

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people, *Respondents.*

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. The Appeals Court incorrectly applied the least restrictive alternative test to the Department of Corrections' regulation of inmate-to-inmate correspondence and erred in requiring the defendants to present evidence of a pattern of security concerns.

2. The Appeals Court incorrectly applied the least restrictive alternative test to the Missouri Department of Corrections' marriage rule and erred in requiring the defendants to present evidence of a pattern of security concerns.

3. The Trial Court's findings of facts were clearly erroneous in that they were insufficient to support the order of the court and proceeded from an erroneous conception of the applicable law.

INDEX

CITATIONS

Cases

Statutes and Miscellaneous Citations

OPINIONS BELOW

The opinions of the lower courts regarding the issues before this Court are contained in the Appendix to the Petition for Certiorari. District Court opinion, *Safley, et al. v. Turner, et al.*, 81-0891-CV-W-6, 82-0072-CV-W-6 begins at A-19 of the Appendix and is also at 586 F.Supp. 589 (W.D. Mo. 1984). The Court of Appeals of Eighth Circuit opinion styled as *Safley, et al. v. Turner, et al.*, 84-1827, 84-2337 appears in the Appendix beginning at A-1 and also is located at 777 F.2d 1307 (8th Cir. 1985).

The opinion of the District Court on the merits is not subject to the certiorari review granted by this Court. However, the opinion of the trial court on the substantive issues of this litigation will assist the court in understanding the issues presented.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit affirming the District Court decision declared the petitioners' regulations concerning correspondence and marriage unconstitutional pursuant to Title 42 U.S.C. § 1983. Pursuant to Title 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was filed within ninety (90) days of the entry of judgment, on or before February 17, 1986. The jurisdiction of the Supreme Court was invoked under Title 28 U.S.C. § 1254(1), and the Writ of Certiorari was granted on May 27, 1986.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Title 42 U.S.C. § 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

I. Introduction

The plaintiffs initiated this lawsuit by filing a complaint for damages in the United States District Court, Western District of Missouri. An attorney was appointed and later, after the District Court consolidated a damage action numbered 81-0891 and an injunctive action numbered 82-0022, the District Court permitted the respondents to amend their complaint on October 5, 1983 and be

certified as a class pursuant to Fed.R.Civ.P. 23(b)(2).[1] A trial, without jury, was held lasting for a five day period during February and March of 1984. On May 7, 1984, the District Court filed its "Memorandum, Opinion and Order". The District Court, the Honorable Howard F. Sachs presiding, held that the Missouri Division of Corrections and Human Resources' (hereafter referred to as the defendants) regulation which required inmates to provide prison officials with a compelling reason before permission would be given for an inmate's marriage was an unnecessary infringement upon the fundamental privacy interests of the marital relationship. *Safley v. Turner*, 586 F.Supp. 589, 594 (W.D. Mo. 1984). The District Court found that the prison officials had not borne their burden of proof. The District Court required the defendants to present a pattern of security or rehabilitative concerns which justified the regulation in light of the court's additional finding that there was a less restrictive alternative available in the form of "counseling" by the superintendent. *Id.* at 594. In a similar vein, the District Court found that defendants' regulations which did not permit correspondence between inmates in separate institutions inside and outside of the State of Missouri without the prior approval of the prisoner's classification team was an

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1. The class is made up of the following persons:

A. Persons who either are or may be confined to the Renz Correctional Center and who desire to correspond with inmates at other Missouri correctional facilities or persons outside of the Missouri Division of Corrections.

B. Persons who desire to correspond with inmates of any Missouri correctional institution whose correspondence with inmates of Missouri correctional institutions has been stopped or delayed for any reason other than an attempt to violate the extant rules of the Missouri Division of Corrections concerning correspondence.

C. Persons who desire to visit or marry inmates of Missouri correctional institutions and whose rights of correspondence, visitation, or marriage have been or will be violated by employees of the Missouri Division of Corrections.

infringement on the inmate's First Amendment rights as annunciated under *Procunier v. Martinez,* 416 U.S. 396, 413 (1974). *Safley v. Turner, supra,* 586 F.Supp. at 595. The District Court held that a less restrictive alternative which would require the prison officials to review each piece of correspondence between inmates was a security measure which was sufficient to protect the institution and its inhabitants from danger. *Id.* at 596.

Notice of appeal was filed by the defendants and briefs were submitted to the Court of Appeals for the Eighth Circuit.

In an opinion filed November 19, 1985, Court of Appeals affirmed that portion of the District Court order finding that the challenged marriage and correspondence regulations were inconsistent with constitutional prohibitions against interference with the First Amendment and the privacy rights implicit in the Fourteenth Amendment to the United States Constitution. *Safley v. Turner, supra,* 777 F.2d at 1316. The Appeals Court, in its discussion of the correspondence rule, affirmed the District Court's application of the standard of strict scrutiny announced by this Court in *Procunier v. Martinez, supra,* on the basis that First Amendment speech rights were directly implicated and ultimately were deprived by the enforcement of the regulations in the instant case. The Appeals Court based its affirmance of the District Court on an analysis that *Procunier v. Martinez, supra,* requires a strict scrutiny analysis whenever a regulation is not a "time, place or manner" regulation of First Amendment activity and is not inconsistent with the prisoner's status as a prisoner. *Safley v. Turner, supra,* 777 F.2d at 1310-1311. Seeming to rely on the Second Circuit analysis in *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1029-33 (2nd Cir. 1985), the Court below found that it was not demonstrated that the exchange of mail between inmates was "inherently" dangerous enough to merit the application of the rational relation test enunciated in *Jones v. N.C. Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977) and *Bell v. Wolfish,* 441 U.S. 520 (1979); *Safley v. Turner, supra,* 777 at 1311-1312.[2]

In a similar analysis, the Appeals Court found that the defendants' regulations governing the application by inmates for permission to be married were an unconstitutional infringement of fundamental privacy rights of inmates. As with its decision concerning the correspondence rule, the Circuit Court found that since marriage was a fundamental right and the regulation absolutely prohibited some inmates from getting married, a standard of "strict scrutiny" was the appropriate rule of law to apply to the facts of the case. The Circuit Court could not find any state interest important enough to sustain the defendants' regulation. *Id.* at 1314.

Defendants also argued to the Appeals Court that the findings of fact and conclusions of law proceeded from erroneous concept of the law, and therefore, not clearly erroneous under Federal Rules of Civil Procedure 52(a) because the District Court specifically did not find that there had been any pattern or practice of the alleged violations of the plaintiffs' constitutional rights. The Appeals Court affirmed the trial court's findings of fact.

II. Statement of Facts

Hereafter, the volumes of transcript of the trial court proceeding will be noted to as Vol. ....., Tr. .....; exhibits in the Joint Appendix will be noted as: Joint Appendix .....; and exhibits attached to the brief as App. .....

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2. The plaintiffs have taken exception to the defendants' use of the term "inherently dangerous". To clear up any confusion, the term is taken from the Circuit Court's reliance on the phrase "special danger *inherent* in concerted group activities by prisoners". *Safley v. Turner, supra,* 777 F.2d at 1311. This language seems to be a take off on the Second Circuit's use of "presumptively dangerous" in their analysis. See *Abdul Wali v. Coughlin, supra,* 754 F.2d at 1031. The defendants' term "inherently dangerous", it is believed, fairly represents both concepts.

The Renz Correctional Center, hereafter referred to as "Renz", is located in Cedar City, Missouri, and is what is commonly termed a "complex prison" because it contains both male and female inmates and inmates of varying security level offenders. The female inmates who are incarcerated at Renz are predominantly medium and maximum security level offenders (Vol. II, Tr. 70).[3] Inmate classifications such as medium and maximum security are arrived at after assessment of various objective factors, such as the crime the inmate committed, the number of years the inmate is sentenced, the propensity for violence associated with the crime, the inmate's history of escape and other violations while in a prison. Most of the male inmates who are housed at Renz are minimum security inmates (Vol. II, Tr. 70). Renz also serves a unique function as a location to "hide" inmates who need special protection from other prisoners in the Missouri Department of Corrections or some other state's department of corrections (Vol. II, Tr. 77-78; Vol. IV, Tr. 23-24).

Structurally, Renz has a minimum security perimeter without the added security elements such as guard towers or walls that other maximum security pisons would normally possess (Vol. II, Tr. 70; Vol. IV, Tr. 230). The other security institutions in the Missouri correctional system have varying differences in perimeters, population, security procedures and facilities all in accordance with their security and population levels (Vol. IV, Tr. 101, 230).

The Superintendent of Renz, William Turner, personally initiated most, if not all, of the educational, vocational and "substance abuse" programs that were in existence at Renz (Vol. II, Tr. 59-64). Since the greater number of female inmates come from home environments in which they had been abused, and that abuse played some part in

3. The medium and some maximum security level women are presently being moved to the Chillicothe Correctional Center in Chillicothe, Missouri.

their crime, these rehabilitation programs were intended to increase inmate skills and self-worth in the hopes of avoiding repetition of the conditions that led to the commission of the crime (Vol. I, Tr. 80-83).

Concurrent with the rehabilitative concerns of the officials at Renz are also the security concerns. As indicated before, Renz has a minimum security perimeter which housed both sexes and all security levels of inmates (Vol. II, Tr. 230). The advantages of this innovative combination of prisoners is the diverse mixing of various levels of rehabilitative attainment and a more lifelike recreation of civilian society within the prison (Vol. III, Tr. 147-150). The disadvantages are the mixture of security concerns among various security levels of inmates and volatile sexual related problems, such as rivalries between competing suitors (Vol. II, Tr. 72-73; Vol. III, Tr. 151). The development of this program at Renz has, unfortunately, been concurrent with the increasing incidents of prison gang violence within the Missouri prison system (Vol. III, Tr. 267; Vol. II, Tr. 75-79). Coincidentally, two weeks before the trial of this action, two inmates were killed in gang related violence at the Missouri State Penitentiary (Vol. III, Tr. 76).

Inmate-to-inmate correspondence at the time of the trial of this action was regulated by Divisional Regulation 20-118.010(e) (Joint Appendix 33). Correspondence was permitted between related inmates by the classification team at Renz (Vol. V, Tr. 50-51, Joint Appendix 39). To determine whether non-family inmates would be permitted to correspond with each other, the classification team considered whether the correspondence would be in the "best interest" of the inmate (Vol. IV, Tr. 259; Vol. V, Tr. 52-54, Joint Appendix 39). For this consideration, the classification team used psychological reports, conduct violations and progress reports contained in the inmate's file. Although these materials were not physically used on each oc-

casion, the classification team and members of the supervisory staff at Renz were familiar with the classification files of most of the inmates (Vol. IV, Tr. 258). In this manner, inmate-to-inmate correspondence was controlled by requiring the prior approval of the prison officials (Vol. IV, Tr. 258). It was not necessary to review each individual piece of mail once the caseworker, and/or the treatment team, were satisfied that they could trust an inmate (Vol. V, Tr. 49).

In daily operation, the correspondence policy was operated in a practical manner. Initially, when a letter arrived, or was being sent out of the institution, the return address or the forwarding address was reviewed by staff in the mail room. If a letter seemed to be suspicious in some manner, it was forwarded to the case supervisor (Vol. IV, Tr. 260-261; Vol. V, Tr. 48-54). The caseworker supervisor would then examine the letter to determine whether the mailing address or the return address indicated it was from a correctional facility (Vol. IV, Tr. 262). The supervisor would check his "approved" list to determine if the inmate who was either sending or receiving the letter had been approved for inmate-to-inmate correspondence (Vol. IV, Tr. 261; Vol. V, Tr. 48-49). If the supervisor was convinced that the letter was clearly suspicious (i.e., that it was an attempt to circumvent the correspondence rule), he opened the letter and scanned its contents (Vol. V, Tr. 46-47, 55-57). Inmate-to-inmate correspondence which merely had affixed on it the legend "legal", if unapproved, was opened and scanned for contraband, plots, or other illegal activities (Vol. V, Tr. 64-65, 68-69). If the materials contained within were legal in nature, the letter was usally permitted to go through and the inmate contacted and instructed to seek approval through the appropriate channels (Vol. V, Tr. 6). Correspondence from non-inmates, if determined to be attempts to surreptitiously circumvent the mail rule, was

returned to the non-inmate (Vol. V, Tr. 66-67). Other than the times when it was suspicious, mail between civilians and inmates was not reviewed (Vol. IV, Tr. 262).

Prior to December of 1983, the Department of Corrections had Rule 20-117.050, which outlined general guidelines to be used if inmates were preparing to get married (Joint Appendix 45). The regulation gave general outlines, which included that the prison would not assist inmates in their preparation to get married. Renz Correctional Institution had an institutional marriage rule, designated as 617.030, which stated in pertinent part, "all finalized plans will be submitted in writing to the institution head for approval" (Joint Appendix 50).

Subsequent to December 1, 1983, the Department of Corrections promulgated a new regulation, 20-117.050, which required inmates to provide the institution with a "compelling reason" to permit an inmate marriage while the inmate was incarcerated (Joint Appendix 47). The defendants understood that a "compelling reason" would be a reason which would be based on the existence and continuation of some prior relationship between the inmates, or that the inmates had a child in common (Vol. I, Tr. 215-216; Vol. IV, Tr. 30). Evidence was presented that marriages had been permitted and prohibited in the past, both at Renz and in other institutions, within the Missouri Department of Corrections. Inmate Nancy Row testified that she had requested to marry an inmate incarcerated at Renz (Vol. III, Tr. 283). Superintendent Turner did not permit the marriage between these inmates for a number of reasons. First, Superintendent Turner rejected the request because Ms. Row did not seem to have considered carefully her choice of a future husband (Vol. I, Tr. 76, 80-84). Also, Ms. Row had a lengthy sentence for her crime and was from an abused situation which contributed to her imprisonment for murder (Vol. I, Tr. 82). Superintendent Turner disapproved the marriage request

of Diane Finley because the superintendent could not determine which of the two men she named in her request was the man she desired to marry (Vol. I, Tr. 183-185). Finally, he considered the fact that inmate Finley had an escape on her record and did not know the crime for which one of her prospective husbands was incarcerated (Vol. I, Tr. 184-185). Another inmate, Judy Henderson, also requested permission to get married. In this case, the superintendent denied the request because she was in protective custody and could not identify any of her enemies (Vol. I, Tr. 177-181). Ms. Henderson's request for marriage was mooted when her "fiancee" was shot and killed while on escape (Vol. I, Tr. 182). Joyce Epley Roberts was told that she should not marry Orville Roberts because she did not know enough about him (Vol. III, Tr. 57-58). Superintendent Turner warned Ms. Roberts that association with her fiancee, a felon, could jeopardize her chances for parole (Vol. III, Tr. 63). Also, Ms. Roberts had trouble with another inmate suitor, and Superintendent Turner had helped her out of the previous entanglement (Vol. III, Tr. 67-69). Linda Thompson's marriage request was denied because she indicated to Mr. Turner that her federal parole officer would refuse to permit her to get married. Superintendent Turner did not feel he should permit her to do something that her federal parole officer would not (Vol. I, Tr. 175-176). The remaining applications of persons requesting to be married were not considered pending the outcome of the lawsuit (Vol. III, Tr. 49-50, 127).

SUMMARY OF THE ARGUMENT

I.

Correspondence Rule

The Court below attempted to limit this Court's analysis and the standards as applied in *Jones v. North Caro-*

lina Prisoners' Labor Union, Inc., supra, Bell v. Wolfish, supra, and *Pell v. Procunier, infra* (hereafter referred to as the rational relations test), to only those activities which were "inherently dangerous" and were "inconsistent with the fact of incarceration".

The lower court's analysis necessarily shifts the burden of proof from the inmates to prison officials, skews the theory and violates the spirit of this Court's analysis of inmates' rights in a prison setting. Fundamentally, it was error not to analyze the defendants' regulation, on the basis of whether the regulations were rationally related to legitimate penological goals. Once established that the regulations were rationally related to a proper penological goal, the burden should have shifted to the inmates to demonstrate that prison officials had substantially exaggerated their response to these concerns. *Bell v. Wolfish, supra,* 441 U.S. at 540-541, n. 23.

The challenged correspondence regulation in the case at bar does not censor the content of any particular type of speech, rather it fairly permits the speech in a particular manner and at a particular time. "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford,* 408 U.S. 104, 115-117 (1972). Defendants' regulation required the prior approval of inmate's correspondence with other inmates. The regulation was "content neutral" because, once a communication was approved between inmates, the correspondence was not censored or otherwise regulated. Although such a regulation may not be appropriate in the "free world", it is perfectly appropriate in the setting where prison officials are attempting to maintain internal security to protect inmates and staff and to promote the inmates' rehabilitation. This special relationship between the inmate and the prison official is not like the relation-

ship between a censor and a civilian. See *Pell v. Procunier*, 417 U.S. 817, 825-826 (1974).

The defendants take exception to the lower courts' assertion that correspondence between prisoners in an institution is not an "inherently dangerous" activity. Prisons, because of their structural identity and the complexion of their populations, differ from one another in a myriad of ways. The prison at issue in this case was a co-correctional institution housing maximum, medium and minimum security prisoners. The essence of the danger of group activity inside a prison is communication between, and the coordination of, inmate action. Group activites, such as a riot, a gang or revenge killing and escapes are just as serious, if not more serious, when the efforts are coordinated between one or more inmates. The primary tenet in the control of concerted group activity within a prison system is to break up the group or separate its leaders. Since communication between prisons is now permitted in the Missouri prison system, that solution is impossible.

II.

The Marriage Rule

In a similar manner, the court found both regulations regarding marriage promulgated by the defendants unconstitutional. The court held the marriage decision itself was a fundamental right, distinct "but equally as important" as, the decisions relating to other family matters. Again, the court found that the strict scrutiny test of *Procunier v. Martinez, supra,* was an appropriate test to be applied in this situation because the regulation was "not a time, place or manner" regulation, and because no alternative method of exercising the rights was available.

The court below made the same error as summarized in the correspondence argument regarding the burdens of proof and the "inherently dangerous" nature of the activity.

The Appeals Court did not recognize that inmate marriages, especially to another inmate, are usually not beneficial to the rehabilitative process and can be a threat to the security of an institution. Furthermore, there was evidence that the superintendent of the institution was concerned that the creation of "love triangles" would increase the danger of violent confrontation. This area is especially important since the Renz Correctional Center is a unique institution in Missouri. The regulation in effect after December 1, 1983 did not totally prohibit marriages between inmates, but it did make the inmate bear the burden of providing a "compelling reason" that the marriage would be of some benefit to him/her.

In the same sense as with the correspondence rule, the Circuit Court's analysis misapplies this Court's principles found in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra; Bell v. Wolfish, supra,* and *Pell v. Procunier, supra,* by relying on the stricter two-prong scrutiny test found in *Procunier v. Martinez, supra.* This reliance on *Procunier* skews the analysis and does not permit the appropriate guidance to state officials.

III.

Findings of Fact

Finally, it is the defendants' position that the Court below was clearly erroneous in that a number of the District Court's findings were not supported by evidence legally sufficient to substantiate the findings of facts. The defendants will also argue that the Court had an erroneous conception of the applicable law. The court repeatedly made findings of facts that amounted to, at worst, conclusions that might state a cause of action for damages, but were not sufficient findings upon which to base a department-wide injunction. Occasions, or instances, of certain conduct, even unconstitutional conduct, should not be the

basis for striking down department-wide regulations. At the very least, the District Court should be required to make a finding of a pattern or practice of unconstitutional behavior on the part of prison officials.

ARGUMENT

I.

The Appeals Court incorrectly applied the least restrictive alternative test to the Department of Corrections' regulation of inmate-to-inmate correspondence and erred in requiring the defendants to present evidence of a pattern of security concerns.

The Appeals Court affirmed the District Court decision that the Missouri Department of Corrections' regulation of inmate-to-inmate correspondence was not the least restrictive alternative and that the penological goals proposed by the defendants could be effectively dealt with by less restrictive means.

The Department of Corrections' regulation permitted correspondence between nonrelated prisoners only under certain circumstances. Regulation 20-118.010(e) set the following limits on correspondence between inmates.

> Correspondence from immediate family members who are inmates in other correctional institutions will be permitted. Such correspondence may be permitted between non-family members if the classification/ treatment team of each inmate deems it in the best interest of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters.

J. Appendix 34.

In its decision, the lower court relied primarily on *Procunier v. Martinez,* 416 U.S. 396, 413 (1974), for its two-step analysis. The court reasoned that the correspondence policy of the defendants was not a "time, place

or manner" regulation of the First Amendment, but rather, was a total prohibition on the correspondence of those inmates who were not approved. They found that the First Amendment as it applied to inmate-to-inmate correspondence was a right not inconsistent with the fact of incarceration and that the proposed penological objectives proposed by the defendants were not legitimate. *Safley v. Turner,* 777 F.2d 1307, 1311 (8th Cir. 1985). The court distinguished this Court's decisions in *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977) and *Bell v. Wolfish,* 441 U.S. 520 (1979) by finding that First Amendment free speech rights were "barely implicated" in those cases and that those cases dealt with inmate activities which were "inherently" or "presumptively dangerous". *Safley v. Turner, supra,* 777 F.2d at 1311. The Circuit Court, in this analysis, seemed to be relying on the analysis of a Second Circuit case, *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1029-33 (2nd Cir. 1985). Because of this reliance, the defendants in this case will respond to the analysis used both by the Eighth Circuit in the present case and the Second Circuit in *Abdul Wali v. Coughlin, supra.*

The defendants submit that the Circuit Court erred because it used an incorrect legal standard and an incorrect analysis when it applied the least restrictive alternative test and failed to assess the appropriate burden of proof on the parties and, therefore, failed to give the appropriate deference to the regulations and to the discretion of the prison officials. The regulation and discretion of the prison officials should be judged on the basis of whether the regulation was rationally related to a legitimate penological goal. Once the prison officials have established that the regulation is rationally related to a proper penological goal, the burden then shifts to the prisoners to demonstrate that the correctional officials have substantially exaggerated their response to legitimate penological concerns.

The First Amendment's application in a prison environment has been universally recognized and widely and diversely interpreted. There is no doubt that prisoners have the reasonable right of correspondence with people outside the prison walls. *Procunier v. Martinez, supra,* 416 U.S. at 408. In *Procunier v. Martinez,* this court recognized that a regulation which permitted censorship of inmates' mail must further a substantial government interest, such as rehabilitation of the inmate or the maintenance of the security of an institution; but also, that such limitation should not be unnecessarily broad to achieve these objectives. Although providing a framework for the analysis of First Amendment claims regarding correspondence with the outside world, *Procunier v. Martinez* is not a case which reviewed the First Amendment guarantees of the constitution as they may be limited by the fact of incarceration. *Procunier v. Martinez, supra,* 416 U.S. at 408. When analyzed purely in terms of the right of inmates to exercise their First Amendment privileges within the confines of the prison, the First Amendment is necessarily more limited. *Pell v. Procunier,* 417 U.S. 817, 822 (1974). This Court, in *Martinez, supra,* and *Pell, supra,* permitted the exercise of First Amendment rights to the extent that the legitimate goals of the prison system were not compromised and paid considerable deference to the discretion of that the prison officials. In *Pell, supra,* there was no requirement the prison officials demonstrate that a less restrictive alternative was available which would effectuate the prison's legitimate objectives. In *Pell,* this Court noted:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State

> and a private citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise."

Id. 417 U.S. at 825-826. *See also, Wolff v. McDonnell,* 418 U.S. 539, 575-576 (1974). In addition, a prisoner's First Amendment rights can be limited by the "operational realities of a prison" and the concept of incarceration. *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125-126 (1977); *Hudson v. Palmer,* 468 U.S. 517, 527-528 (1984). Further, in *Pell v. Procunier, supra,* and later in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra,* this Court modified the "least restrictive alternative test" when resolving issues involving the exercise of inmates' rights in a prison environment. *See* Robins, *Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration,* 71 J.Crim.Law & Criminology, 211, 215-216 (1980). In *Block v. Rutherford,* the Chief Justice specifically affirmed that, "administrative officials are not obliged to adopt the least restrictive means to meet their legitimate objectives." *Block v. Rutherford,* 468 U.S. 576, 596 n. 11 (1984); Accord, *Thorne v. Jones,* 765 F.2d 1270, 1275 n. 7 (5th Cir. 1985).

Subsequent to the *Jones* opinion, this Court in *Bell v. Wolfish,* 441 U.S. 520 (1979) noted:

> In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggeratedd their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."

Id. at 540, n. 23; *see also, Hudson v. Palmer, supra,* 468 U.S. at 529-30.

The analysis the Circuit Court should have applied in the instant case was whether the correctional officials' regulation was rationally related to the legitimate goals of security, rehabilitation of inmates and the internal order of the institution. The term "rational" is not meant to mean that the choice made was necessarily the best measure which could have been applied in the situation. The term "rational" is meant to mean a measure that could be seen as reasonable in light of the legitimate penlogical goal. The defendants' witnesses testified that this regulation was intended to maintain the security and internal order of the various institutions within the Missouri Department of Corrections. To that end, the regulation was intended to control communications between prisoners at various institutions within the Missouri system. For example, the Superintendent at the Renz Correctional Center, Mr. Turner, believed that a disturbance at another prison within the Missouri system did not spread to the Renz Correctional Center because only those inmates who were approved to correspond were corresponding (Vol. II, Tr. 74). The correspondence rule had also assisted the superintendent in maintaining control over escapes at his minimum security institution. That problem of escape is exacerbated by the fact that Renz does not have the added security perimeter of a maximum security unit (Vol. II, Tr. 74-76). Also, and ever increasingly important within the Missouri prison system is the control of gangs (Vol. II, Tr. 76-77). Just two weeks before the trial of this matter, two inmates were killed in gang related violence (Vol. II, Tr. 76). In addition, Renz has the unique attribute of hiding inmates from other inmates within this system (Vol. II, Tr. 78). Mr. Turner testified that he felt there was no possible way that all the mail from each correctional institution could be read if free correspondence was permitted, thus opening the door for potentially dangerous mishaps (Vol. II, Tr. 119). The

regulation in effect at the time of the trial permitted the prison officials to approve the inmates who wanted to correspond rather than having to approve each separate piece of correspondence (Vol. II, Tr. 118, 119).

Sally Chandler Holder, the then Director of the Kansas Correctional Institution at Lansing which had been a co-correctional institution since 1980, testified that although Kansas had an open inmate correspondence policy, it was her opinion that they had problems with it (Vol. III, Tr. 158). In fact, it is her opinion that it contributed to an escape because the inmates were able to determine the shift assignments and that the institution was low on security (Vol. III, Tr. 158). Although Kansas has an open inmate-to-inmate correspondence policy, it has become apparent to the prison officials in Kansas that it is impossible to monitor all of the mail (Vol. III, Tr. 158). Although not mentioned by the District Court or the Circuit Court in their opinions, Kansas, at this point in time, does not have the kind of gang problem that Missouri is experiencing (Vol. III, Tr. 159-160). Ms. Holder also believes that monitoring mail is a poor allocation of staff time (Vol. III, Tr. 176).

Donald Wyrick, the then director of Adult Institutions for the Missouri Department of Corrections, testified that control of correspondence was considered important to the interception of escape plots, murders, murder plans and the control of the Aryan Brotherhood and other inmate gangs (Vol. IV, Tr. 225-228). Ellis McDougal, a Professor of Criminal Justice, felt that the correspondence policy was essential to the control of gangs as they infiltrated and progressed from California through various states' correctional systems (Vol. V, Tr. 13-14). Mr. McDougal was in favor of preventing correspondence between inmates except in limited situations (Vol. V, Tr. 19-20). He indicated that it was his estimate that only one quarter of inmate-to-inmate correspondence between non-relatives could be considered healthy (Vol. V, Tr. 22).

As this brief summary of the testimony in the case indicates, the choice to restrict correspondence to prior approval is an accepted prison practice and reasonable choice under the circumstances. It certainly is not the only choice, but given the fact of increasing gang violence, the personal experience of the prison officials, and the fact that Renz is a unique prison, it would seem that the decision is not irrational.

Further, the lower courts erred in applying the least restrictive alternative standard which necessitated that the state bear the burden of proving that there was a pattern of circumstances that threatened the security of the institution or that the same interest could not be accomplished in a less restrictive manner. This flies in the face of this Court's decision in *Jones* where this Court opined:

> Without a showing that these beliefs were unreasonable, it was error for the District Court to conclude that appellants needed to show more. In particular, the burden was not on appellants to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order."

Jones v. N.C. Prisoners' Labor Union, Inc., supra, 433 U.S. at 127-128.

Defendants' witnesses presented evidence that they sincerely believed that there was a danger in not enforcing the correspondence policy. Prison officials do not have to present evidence of the unrelenting certainty of a danger to the security of the institution. Only that they sincerely believe that there is a present danger. On this point, the Eighth Circuit had previously opined:

> [Prison officials need] only to produce evidence that to permit the exercise of first amendment rights would create a potential danger to the institutional security . . . Once the state has met its burden going forward with the evidence, the courts must defer to the expert judgment of the prison officials unless the

> prisoner proves by "substantial evidence . . . that the officials have exaggerated their response" to security considerations. [Citations omitted.]

Otey v. Best, 680 F.2d 1231, 1233 (8th Cir. 1982), citing *St. Claire v. Cuyler,* 634 F.2d 109, 116 (3rd Cir. 1980).

The evaluation of the scope of the regulation must be done in light of the type of evidence the prison official can provide. If a challenged regulation is working, it is difficult, if not impossible, for prison officials to produce documentary evidence, or any evidence, of a tangible nature of what the problem would be if, in fact, the regulation was not in existence. This is probably the reason that this Court has been so clear in shifting the burden to the prisoner to prove that the officials have exaggerated their response. In *St. Claire v. Cuyler, supra,* the Third Circuit Court of Appeals specifically addressed the degree of evidence needed to demonstrate the reasonableness of the prison officials decisions. They noted, "This evidence may consist of expert testimony from responsible officials, provided they testify to opinions that are "held 'sincerely' and [are] arguably correct." *Id.* at 114.

The regulation which permitted the classification and treatment team to review the initiation of correspondence between inmates was intended to anticipate potential security problems and to enhance the individual's rehabilitation program (Vol. IV, Tr. 259-260). Although all treatment and classification teams base their decisions on similar regulations, their decisions naturally varied in light of the conditions of each individual institution (Vol. IV, Tr. 228-229). A maximum security institution, enclosed as the Missouri State Penitentiary is by high walls patrolled by many guards, may have the flexibility to permit more correspondence between inmates (Vol. IV, Tr. 230). At the opposite extreme, Renz, with such a diverse population and a relatively limited security perimeter, may well have a different view on the correspondence between in-

mates. A mistake in scanning the mail at Renz is not blunted by the extremely tight security measures as would a similar mistake at the Missouri State Penitentiary.

There was testimony at the trial that there had recently been two gang related murders and an overall increase in tensions within the prison system due to increased population. The only effective way of combatting prisor gangs or prison violence and other tensions is to anticipate violence between inmates. David Blackwell, the former director of Adult Institutions, testified:

> A. Well, historically correctional administrators have learned one of the cardinal rules in attempting to secure and keep secure a facility, that certain types of correspondence between inmates located in different institutions, or even in the same institution, once you learn of the nature, particularly the potential, negative potential of that correspondence, can be a true threat or grow to be a true threat to security.
>
> Q. Are there any specific areas?
>
> A. Well, for example, we go to great length to maintain a computer listing of enemies. In other words, you can enter an offender's name or number and the program is written such that it will produce what we have previously programmed as known enemies of that offender. And we use those lists in transfer consideration and in many other program security discussions.
>
> The intent of that is obvious. You don't want two people coming together who are known enemies in terms of an issue of protection of one or both. If you allow carte blanche correspondence, you've really negated that function and that effort. In other words, an inmate of one facility could correspond with another and describe a previous problem they have had with yet another inmate in that facility and give some instruction to seek out vengeance or in other ways retaliate.

Vol. III, Tr. 264-265. Later he testified concerning the gangs:

THE WITNESS: One particular area of concern that is not so new to some other states but is relatively new to Missouri is the development of gangs in institutions, and those are gangs that began together out of ethnic reason or purported religious similarities.

And in Missouri we've started to witness an increase in gang activity in the last 18 months. We have done some research and reading and attended conferences on gangs and ways to deal with those gangs. And the very first premise that is taught or considered in trying to dissuade gang organization and influence in the institution is through the gang members' communication.

That can be affected in several ways. One is by restricting correspondence. Another is by transferring gang members to different facilities so they can't communicate effectively or visit with one another; and that has proved to help us in the State of Missouri keep the gang activity, at least to date, at a reasonable level. And that has also been other state and federal bureau prisons' policy.

Vol. III, Tr. 266-267.

Mr. Blackwell also noted that volatile problems are initiated by increased communication between inmates competing for the affections of other inmates (Vol. III, Tr. 271).

In addition, pursuant to the Department of Corrections' duty to rehabilitate inmates, correspondence between male and female inmates, even between male inmates, is felt to be detrimental to the rehabilitation of inmates. See § 217.300-435, RSMo Supp. 1982. Pursuant to this goal, the Superintendent at the Renz Correctional Center established a wide range of educational, vocational and drug treatment programs for the improvement of inmates. These programs require that inmates develop a greater responsibility for themselves and necessitate that inmates develop some level of initiative (Vol. IV, Tr. 152). It was the

opinion of one of the expert witnesses that the maintenance or initiation of correspondence between male and female inmates and even correspondence between male inmates only reaffirms the negative influence that felons have on one another (Vol. IV, Tr. 17-19). This limitation is not different from the common, and supposedly constitutional, requirement that persons on probation and parole not associate with other felons.

Open-ended inmate correspondence means hundreds of new lines of communication between institutions which will beg for a misstep by an employee in reviewing and scanning literally thousands of pieces of mail. If a mistake is made, an inmate may suffer an injury. In the manipulative and hard world of prison society, inmates will have their rehabilitation retarded because instead of breaking relations with old inmate friends, they will have a new avenue to continue their felonious relationship and education. It is in such areas of practical concern that it is important for courts to defer to the expertise of prison officials.[4]

The Circuit Court, in affirming the district Court, relied quite heavily on *Abdul Wali v. Coughlin, supra,* to distinguish the defendants' argument that all rights are limited by the realities of incarceration. What the Circuit Courts in *Safley v. Turner* and *Abdul Wali v. Coughlin* seem to be deciding is that the two-prong standard announced in *Martinez, supra,* is only applicable to a prison environment only if an activity was not "inherently dangerous" or the challenged regulation was a "time, place or manner" restriction that permitted alternative avenues for the exercise of the right. *See Abdul Wali v. Coughlin, supra,* 754 F.2d at 1029-1032; *Safley v. Turner, supra,*

4. Indeed, the United States Court of Appeals for the Eighth Circuit has recognized the dangers of surrepititious correspondence between inmates, even to the level of acknowledging that the regulation of the secret correspondence is a "compelling interest". *Watts v. Brewer,* 588 F.2d 646, 650 n. 6 (8th Cir. 1978).

777 F.2d at 1310-1312. This naturally leads to the conclusion that if an activity is not "presumptively dangerous" or if the regulation does not permit an alternative means of exercising the right, the prison officials must then prove that their regulation is the least restrictive alternative available for the exercise of the right.

This analysis is fundamentally flawed because it cannot be applied without an appeals court deciding what is "inherently dangerous". The procedure recommended in *Abdul Wali v. Coughlin, supra,* and *Safley v. Turner, supra,* would necessitate a court assessing the relative dangerousness of activities within the prison walls and to assign a standard of review to each activity ranging from the least restrictive alternative analysis to the more lenient rational relations test. This *ad hoc* analysis is illustrated by the manner in which the courts in *Abdul Wali* and *Safley* distinguished each of the decisions by this Court with an assessment of the dangerousness of the respective inmate activity. This type of analysis would not only lead to inconsistency among the circuits, since each court would view certain inmate activities in a different light, it would also make the writing of prison regulations impossible. Since each prison is different in configuration and in the makeup of its population, prison officials would have to prepare regulations and predict whether or not the activity regulated would be considered dangerous enough to merit deference to their decision. In each situation the prison officials would be guessing whether the burden would be placed on them to prove that the regulation is the least restrictive alternative or whether the burden was to be placed on a prisoner because the activity was "pesumptively dangerous". *See, Abdul Wali v. Coughlin, supra,* 754 at 1031; *Safley v. Turner, supra,* 777 F.2d at 1312-1313.

The potential of divergence of opinion is illustrated by the Appeals Court's dismissal of the defendants' security concerns. The Appeals Court did not view communication between inmates as a dangerous activity. *See, Safley v.*

Turner, supra, 777 F.2d at 1311. Yet the coordination of inmate activity, whether it be by word of mouth or by letter, is easily the most feared of all inmate dangers. Dangerous acts, such as gang killings, riots or other demonstrations, require coordination which would be facilitated by communication among prisons. Inmate-to-inmate communication is an "inherently dangerous" activity just as this Court found inmate association to be in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra,* 433 U.S. at 129.

The Appeals Court's reliance on the "least restrictive alternative" is also not appropriate. As was noted by Justice White in *Regan v. Time, Inc.,* 468 U.S. 641 (1984), a less restrictive alternative analysis should not be used when analyzing a regulation which arguably regulates the "time, place and manner" of the exercise of a First Amendment right. *See, Regan v. Time, supra,* 468 U.S. at 657; *see also, Clark v. Community For Creative Non Violence,* 468 U.S. 288, 299 (1984).

The use of the "least restrictive alternative test" would also unfairly shift the burden of proof from the prisoners to the petitioner instead of having the prisoners shouldering the burden of proving by substantial evidence that prison officials exaggerated their response to the security considerations involved. If a regulation is performing as expected, it would be extremely difficult for prison officials to produce evidence of what bad results would occur if the regulation was found to be unconstitutional. A prison official just cannot produce bleeding bodies to demonstrate the effectiveness of their regulation. Even after the regulation is in place, mail scanners are going to miss the complex codes by which messages are passed from inmate to inmate in seemingly innocent correspondence. As has been pointed out repeatedly, prison officials have to be able to anticipate trouble; if they can only react to it, they will eventually fail to take appropriate measures. Such a failure will result in a tragedy

that will be far more serious than the accidental infringement of the notice requirements of *Procunier v. Martinez, supra.*

In the court below, the decision hinged on the fact that the correspondence policy was not a "time, place or manner regulation" and that thus the regulation unduly burdened the inmates' exercise of their First Amendment rights. The important aspect of such regulations is that they do not restrict the content of the speech and that they fairly permit the activity at a particular place and at a particular time. As it was noted by Justice Marshall in *Grayned v. City of Rockford,* 408 U.S. 104, 116-117 (1972):

> Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time.* Our cases make clear that in assessing the reasonableness of regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. (Citations omitted.) [Emphasis added.]

See also, Effron v. Intern. Soc. for Krishna Consciousness, 452 U.S. 640, 650-651 (1981).

Although prisoners do not lose all their rights when they are incarcerated, the fact of their incarceration limits the exercise of most of the rights non-inmates take for granted. *Jones v. North Carolina Prisoners' Union, Inc., supra,* 433 U.S. at 125-126. Voting, travel, religious observance, speech, marriage and communication are limited by the operational realities and the legitimate penological interests of the prison. This is not to propose that the analysis is limited merely to the type of individual involved, but is important to note who the individuals are, where they are located and what they are capable

of doing plays a substantial part in weighing the various factors to be assessed when applying a regulation which can justifiably restrict the exercise of a constitutional right. The regulation of communication between inmates in a prison setting may be the only way, short of a total 24-hour lock down such as the federal penitentiary in Marion, Illinois, is experiencing, of controlling prison violence.

Even applying the test of a "time, place and manner" regulation (i.e. that the regulation may not be based upon the content of the speech, that it serves a significant government interest and there are alternative channels for communication), this regulation could conceivably pass the test. *See, Regan v. Time, Inc.*, 468 U.S. at 648. The regulation did not censor the content of the speech between inmates. Once an inmate was approved, he was permitted to write concerning anything he wanted. The same can be said about the second requirement of the test. Certainly the control of prison violence and the maintenance of prison security is a substantial governmental interest. Finally, there are alternative avenues of communication for these inmates. This regulation did not prohibit all correspondence between inmates, it merely required that the inmate gain prior approval for the correspondence. Furthermore, and importantly, even under the strictest interpretation, the regulation only restricted communication between inmates. The press, civilians, inmates who have been released for more than six months and relatives of the inmates who are incarcerated were permitted to correspond with incarcerated inmates.

Finally, in this case the court relied on the belief that the prison officials could easily ensure the security of an institution by scanning each piece of mail. In a system that now numbers over 10,000 people, this means literally thousands of pieces of mail which need to be scanned. Not only does that beg for a misstep by an employee, a misstep which could not be uncovered until after the

mistake was made, but it is not an appropriate way of using limited resources. Instead of new guards and other staff in the prison system, Missouri now has mail monitors. It is possible that such an allocation of resources is a good idea, but the choice not to scan the mail should not be considered an unconstitutional choice. *See, Schlobohm v. U.S. Attorney General,* 479 F.Supp. 401, 403 (M.D. Pa. 1979). Many states permit correspondence between inmates and many states do not, such decisions are best to the judgment of the prison officials.

II.

The Appeals Court incorrectly applied the least restrictive alternative test to the Missouri Department of Corrections' marriage rule and erred in requiring the defendants to present evidence of a pattern of security concerns.

The United States District Court for the Western District of Missouri held that the Department of Corrections' restrictions on inmate marriages were unnecessarily broad and were unconstitutional because they infringed upon plaintiffs' right to marriage since they were far more restricted than was reasonable or essential for the protection of any state security interest, or any other legitimate interest. Citing *Bradbury v. Wainwright,* 718 F.2d 1538 (11th Cir. 1983); *Lockert v. Faulkner,* 574 F.Supp. 606 (N.D. Ind. 1983); *Salisbury v. List,* 501 F.Supp. 105 (D. Nev. 1980); *ABA Standard for Criminal Justice,* 23-8.6(a), (i) (2nd Ed. 1980).

The District Court applied the least restrictive alternative test since they noted that the defendants "had no right to have the last word in a personal decision of this importance." *Safley v. Turner,* 586 F.Supp. at 594-595. It was assumed by the Appeals Court that the Trial Court meant that there could be an alternative, and less restrictive, means for achieving the prisons' legitimate objectives of security and rehabilitation. *Id.* at 1313.

The defendants submit that the Appeals Court erred in its application of the legal standard of the least restrictive alternative test. Further, the court used the wrong legal standard in assessing the respective parties' burdens of proof and failed to assess the evidence and give the appropriate deference to the decisions made by the correctional officers in light of their legitimate security and rehabilitation concerns.

Until relatively recently, it had been assumed that a prisoner had no right to have a marriage ceremony performed in prison. *Johnson v. Rockefeller,* 365 F.Supp. 377, 380 (S.D. N.Y. 1973), *aff'd mem. sub nom., Butler v. Wilson,* 415 U.S. 953 (1974); *Polmaskitch v. U.S.,* 436 F.Supp. 527, 528 (W.D. Okla. 1977) (dicta); *Wool v. Hogan,* 505 F.Supp. 928 (D. Vt. 1981). Prohibitions against marriage while incarcerated have been upheld in reliance on a specific state statute prohibiting marriage between inmates. *Johnson v. Rockefeller, supra,* 365 F.Supp. at 380. Prison regulations published or unpublished have also been deemed a sufficient basis for, and an appropriate response to, the perceived pursuit of penological goals. *See, In Re: Golen,* 512 P.2d 1028, 1030 (Utah 1973), *cert. den'd,* 414 U.S. 1128 (1973); *Hudson v. Rhodes,* 579 F.2d 46 (6th Cir. 1978) (per curiam).

The fundamental right to marry while incarcerated is limited, and it is limited in the same manner that the exercise of other constitutional rights by inmates are limited. The Supreme Court in *Bell v. Wolfish,* 441 U.S. 520 (1979), noted:

> In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of the correctional officials, and, in absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such manners."

Id., 441 U.S. at 540, n. 23. Prisoners' rights can be limited by the mere fact of and concept of incarceration. *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125-126 (1977).

There is little reason to apply the "least restrictive alternative test" after the advent of *Jones v. North Carolina Prisoners' Labor Union, Inc., Id.* at 125; *Bell v. Wolfish, supra,* 441 U.S. at 541; *Block v. Rutherford,* 468 U.S. 576, 591, n. 11 (1984); *Otey v. Best,* 680 F.2d 1231, 1233 (8th Cir. 1982). The proper test is whether there is rational relation between legitimate penological interests and the prison's regulations. It is the plaintiffs' burden to prove by "substantial evidence" that the prison officials have exaggerated their response. *Otey v. Best, supra,* 680 F.2d at 1233.

The witnesses for the appellants presented evidence that the marriage regulation promulgated in December of 1982 was not an irrational attempt to achieve the proper and legitimate penological goals of security, rehabilitation and maintenance of internal order (see J. Appendix 47 for regulation). Superintendent Teurner testified that it was his opinion that some personal relationships between inmates, whether sexual or not, were detrimental to their rehabilitation (Vol. II, Tr. 66-67). This was based on the belief that women prisoners whose crimes were connected to abuse that they had suffered in their homes needed to concentrate on developing skills of self-reliance (Vol. I, Tr. 80-81). There was testimony from the former director of Adult Institutions and the then diector of Adult Institutions, Donald Wyrick, that marriages between inmates pose substantial security risks because of the increasing potential for escape and the increased risk of inmates taking advantage of other inmates (Vol. IV, Tr. 231-233, 32-33). The regulation was drafted not to prohibit marriages between inmates, but to shift the burden to the inmate to demonstrate that he or she was a safe

gamble. Further, the term "compelling interest" was understood to mean that there should be a mutual interest, such as a child, or prior relationship (Vol. IV, Tr. 20-22, 30).

Since there was evidence to demonstrate that these beliefs were reasonable, it was error for the court to shift the burden to the defendants to demonstrate justification or proof of some sort of a threatening pattern of inmate behavior which would justify the marriage rule. *Rogers v. Scurr*, 676 F.2d 1211, 1215 (8th Cir. 1982). In fact, the record provides little if any justification for the conclusion that the defendants exaggerated their response to marriages between inmates. The Department of Corrections, when it prepared and implemented this regulation, was not writing on an empty slate. Mr. Turner testified that he had considered other requests to be married. One such request involved Nancy Row. Nancy Row's request was denied because of a combination of factors (Vol. I, Tr. 78). Outside of the prison she had been abused by men. After reviewing her specific needs, the superintendent felt it was not in her best rehabilitative interests to be permitted to marry another inmate (Vol. I, Tr. 79-82). Turner testified that it was his duty to provide her with the skills of self-reliance, and he felt that his decision facilitated the achievement of that goal (Vol. I, Tr. 81, 177).

What the Court failed to understand in its assessment of Superintendent Turner's testimony is that he has a duty to rehabilitate prisoners. If the superintendent perceives certain activity which detrimentally affects the rehabilitation of an inmate, he should be permitted to prohibit or limit such activity. In Nancy Row's case, obviously, the denial assisted her in her rehabilitation. She testified that Mr. Turner has always treated her with respect and that she was now working in the control center with him (Vol. III, Tr. 49). She was aware that Mr. Turner was concerned that male inmates would promise female inmates things that the male inmates could

not provide (Vol. III, Tr. 44), but that he was attempting to assist the women at the institution to be "ready to go out into the community" (Vol. III, Tr. 48).

The decisions of Superintendent Turner have to be taken in the context of the prison setting. Joyce Epley Roberts testified that Superintendent Turner interfered with her attempts to marry another inmate at the Renz Correctional Center (Vol. III, Tr. 57-58). While alleging that Mr. Turner threatened her with the loss of her children, she later indicated that, at worst, she had suspicions that somebody at Renz may not have notified her of a hearing in the acrimonious custody fight between herself and her ex-husband (Vol. III, Tr. 70-72). Unfortunately, Mr. Turner had previously dealt with Ms. Roberts' desire to marry an ex-felon (Vol. III, Tr. 67-68). In that situation, she admitted that the previous suitor was a "gigolo" and attempted to obtain possession of money and her car from her and that Mr. Turner saved her from making a terrible mistake (Vol. III, Tr. 68). In fact, this ex-felon returned to the prison for thirty-one consecutive days in an unsuccessful attempt to see Ms. Roberts (Vol. III, Tr. 67).

Diana Finley had repeatedly asked to marry various inmates and seemed to have a remarkable lack of knowledge about the criminal records of her inmate suitors (Vol. I, Tr. 183-182, 186; Vol. IV, Tr. 218). There was also testimony that Ms. Finley and her latest suitor, Mr. Quillum, both had separate escapes on their records. Further, as the stipulation in the record indicates, she provided the superintendent with incorrect and possibly fraudulent information concerning the identity of the person she wanted to marry (Vol. IV, Tr. 219-220).

P. J. Watson/Safley was not permitted to marry the named plaintiff because she had herself asked that Len Safley leave her alone and threatened him (Vol. IV, Tr. 252-254). It was only after the filing of the lawsuit that

there seemed to be any change in sentiment (Vol. II, Tr. 47, 49). Unfortunately, in a situation where there has been a violent threat, or a perceived violent threat, a superintendent is not free to gamble on changes of heart when handling violent inmates.

Finally, Judy Henderson was denied permission to marry on the basis that she had requested "protective custody" and because she could not identify her enemies. She had confided in Mr. Turner that she feared for her safety because she was scheduled to testify in the criminal trial of her co-defendant in Springfield, Missouri. Superintendent Turner was concerned that such a sudden blossoming relationship between Ms. Henderson and her proposed husband was a possible indication of some danger (Vol. I, Tr. 178-179). It should be noted that her proposed husband was later killed while on escape from the Department of Corrections (Vol. I, Tr. 182).

The errors of the lower courts are best summed up by their assumption that inmates should be permitted to "make their own mistakes". *Safley v. Turner, supra*, 586 F.Supp. at 595. In some ways, that goes to the heart of the problem in the case before this Court. It is the defendants' contention that inmates should not be permitted to make mistakes while incarcerated within the Department of Corrections. These mistakes affect the security, the orderly maintenance of the institution, and they may also affect the results of the petitioners' attempts to rehabilitate the inmates. It is in protecting women inmates from "gigolos" that Superintendent Turner hopes to better prepare them to function in the outside world. It is easy, in retrospect, to question the judgment of Mr. Turner that Judy Henderson was in danger when his instincts told him that her relationship with the male inmate had developed too fast; or that P. J. Watson had had a sudden change of heart and decided that Leonard Safley was her long lost love. It is also inappropriate. Superintendent Turner is vested with the responsibility

of protecting inmates from each other and if he is wrong in his suspicion that one inmate is in danger from another, he can only say that he performed his duty in good faith. However, if he is wrong and that inmate is injured, he then suffers the liability. Judy Henderson's proposed suitor was killed while on escape from the Division of Corrections. Diane Finley testified that she provided the superintendent with incorrect information and had an escape to her credit. Len Safley used the alias "Jack King" to circumvent the mail rule. Superintendents of prisons have to deal, to the best of their ability, with a class of people who are under their care because the people have committed major mistakes. A superintendent cannot always trust the prisoners' word, their judgment of themselves, or of others. The regulation at issue permitted Superintendent Turner to assess by analysis of his staff's reports based upon the staff's knowledge of the inmates' judgment and maturity. As one of the defendants' experts testified, women inmates suffer from different types of problems compared to male inmates. Those different problems have contributed to the women inmates' criminal behavior. Too often they were overly dependent on males (Vol. III, Tr. 154-155). She testified that inmate-to-inmate marriages are detrimental to any sort of rehabilitative effort for an inmate:

> A. That would even be worse than allowing someone to marry someone from the outside because at least then you would have one partner who is out in society and who is not involved in an inmate situation.
>
> I think you have to understand that life inside an institution is not the same as life on the outside. They are not the same. And just for example, we've had lots and lots of inmates who left the institution, males as well as females, who thought they were in love forever; and it doesn't take very long on the street before this relationship has broken down and no longer exists. We have found that most of the relationships do not exist beyond one leaving the institution.

> Q. What effects does an inmate-to-inmate marriage have on inmate rehabilitation in your opinion?
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> A. Oh, I think you would just put up a big stumbling block. I think you would make our job far more difficult. I think that would also be an administrative nightmare to try to deal with inmate-to-inmate marriages and inmate-to-inmate divorces which, of course, would follow from that.

Vol. III, Tr. 156-157.

In addition to the rehabilitation problems involved there are the security problems. It should be noted that the "gigolo" attempted to visit Joyce Epley Roberts for thirty-one consecutive days. The suitor's rising frustration and the need for the superintendent to monitor that situation is an indication of the kinds of security problems one confronts when supervising a prison. Sally Chandler Halford testified concerning problems she has with jealousies which develop between inmates who have a common object of affection. She testified that she had to lock up one woman prisoner every time her ex-offender, ex-husband visited his new wife (Vol. III, Tr. 163). If Leonard Safley had not been transferred from Renz after the threat against his life and later had been assaulted, would any court accept the defense that Mr. Turner had only thought of the affair as a "lovers' quarrel" (Vol. IV, Tr. 252, 253). See also, *Safley v. Turner, supra,* 589 F.Supp. at 593. Correctional personnel have to anticipate danger rather than merely react to it. The regulation permitted them that critical edge.

The lower courts substantially relied on the cases of *Zablocki v. Redhail,* 434 U.S. 374 (1978), and *Bradbury v. Wainwright,* 718 F.2d 1538 (7th Cir. 1983). In *Zablocki v. Redhail,* this Court invalidated, pursuant to the Equal Protection Clause, a state statute which did not permit a person to marry if he or she had not satisfied their financial obligation to their child. *Zablocki v. Redhail,* 434 U.S. at 377-378. The majority opinion, writtten by Justice

Marshall, found that the decision to marry was a fundamental right. *Id.* at 386. The decision seemed to turn on the basis that all the atttributes of married life were protected by the right to privacy, and thus, it was illogical not to protect the decision itself. *Id.* at 385-387.[5] Although the decision struck down the Wisconsin statute, the Court was acknowledged repeatedly that the states have traditionally had a substantial ability to regulate the rights and incidences of marriage. *Id.* at 386. *See Sonsa v. Iowa,* 419 U.S. 393, 404 (1975). See also, *Zablocki v. Redhail, supra,* 434 U.S. at 392-393 (Stewart concurring). The substantial problem with both lower courts' analysis in this case is that they relied on *Zablocki v. Redhail's* holding that the decision to marry was a fundamental right and then applied the least restrictive alternative test without also applying the appropriate analysis of whether the right could be limited by the fact of incarceration. Fundamental rights are limited because a person is in prison. As testimony indicated, the decision to get married causes substantial problems to prison security, the maintenance of internal security and adversely affects the rehabilitation of inmates. Especially with inmate-to-inmate marriages, the regulation requires only that the inmate demonstrate a compelling reason to be married. In effect, the plaintiffs are arguing that the fact that marriage is a fundamental right forecloses the state's right to regulate the prerequisites of marriage. States routinely deny prospective applicants for marriage licenses in the interest of age, degree of familial relationship, health, requirements of state residency, sexual preference and sometimes even budgetary limitations. *Sonsa v. Iowa,* 419 U.S.

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5. Concurring with the court's decision, Justice Powell and Justice Stewart writing in separate opinions, found the Due Process clause as more appropriate vehicle for striking down the statute. *Id.* at 391-403. It is assumed that the courts below found the regulation in the present case to be invalid because it violated the protections of the Due Process clause rather than the Equal Protection Clause.

at 406-407. The prison officials should have no less discretion to regulate inmate-to-inmate marriage because of the fact that inmate-to-inmate marriages have a shorter duration and that inmate marriages can be "cover" for illegal activities. All these facts support the discretion of the administrator as long as the inmate is incarcerated in the system.

Nor did the courts below apply *Bradbury v. Wainwright*, 718 F.2d 1538 (11th Cir. 1983) correctly. The plaintiffs would submit that the court did not consider any of the unrebutted evidence indicating that inmate-to-inmate marriages detrimentally effect the defendants' legitimate penological goals (Vol. II, Tr. 59-63). Even under the standard in *Bradbury v. Wainwright, supra*, the regulation could have been upheld. *Id.* at 1544-45. The court did not find any bad faith on the part of the appellants; at worst, it found them guilty of paternalism. *Safley v. Turner, supra*, 598 F.Supp. at 592, 597. Such findings indicate that the judge disapproved of the judgment of the appellants, but not of their intent. Further, the court ignored the evidence of the rehabilitative efforts of the appellants (Vol. II, Tr. 59-60).[6]

The plaintiffs have made much of the fact that the term "compelling interest" was not defined in the regulation. However, it was defined and understood to mean basically some sort of prior relationship between the inmates or that the couple had had a child as a result of their union (Vol. III, Tr. 152-155; Vol. IV, Tr. 20-21). Although there were some differences in syntax and explanation, the witnesses described the same fundamental

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6. The defendants submit that *Lockert v. Faulkner*, 574 F.Supp. 606 (N.D. Ind. 1983); *Salisbury v. List*, 501 F.Supp. 105 (D. Nev. 1980), have substantially the same weaknesses. In those cases, the courts never reviewed the exercise of the right in light of a prison forum. More to the point is the case of *Wool v. Hogan*, 505 F.Supp. 928, 932 (D. Vt. 1981). As noted by that court, the right of the formal ceremony, standing alone, should not be an unlimited right. *Id.* at 932.

interpretations of the regulations (Vol. I, Tr. 215-217; Vol. IV, Tr. 24, 30-37). The plaintiffs have argued that it is not rational to assume that the marriage of two inmates who meet in prison creates a greater security risk than does the marriage of two inmates who lived together before they were incarcerated. Actually, the plaintiffs have a point in the sense that marriage between inmates in prison, from the inmates' own testimony, is very seldom a good idea (Vol. III, Tr. 156). Whether the inmates met before or during their incarceration is not relevant to the risks imposed by the marriage itself. If it was not for some sort of relationship or other compelling reason, prison authorities probably would not approve, wholesale, marriages between inmates (Vol. III, Tr. 152-155; Vol. IV, Tr. 20-21). As has been noted by the authorities, in the "unreal world" of prison society, inmates have bad effects upon each other (Vol. III, Tr. 156; Vol. IV, Tr. 34). The regulation was an attempt to break up that sort of education, to avoid the love triangles and to prevent the use of one inmate by another (Vol. III, Tr. 155). Since the institution has a minimum security perimeter, the officials at Renz are always afraid of the unexpected (Vol. IV, Tr. 228-229). The plaintiffs in this case put themselves in prison by making some very bad life choices (Vol. III, Tr. 154). It is ironic that the district court found that it was appropriate to ban visits of former inmates based on evidence that such a ban tends to break up criminal association, yet will not let officials stop the same association through marriage.

Finally, the marriage issue has a different twist when compared to the correspondence issue. In *Procunier v. Martinez, supra*, this Court found that the infringement on the rights of civilians who had committed no crimes shifted the balance toward the protection of their first amendment right even though there may have been some security concerns involved. In the first argument, the defendants have argued that the security concerns are differ-

ent when dealing with two incarcerated felons. In the present argument, the regulation affected both inmate-to-inmate marriages and civilian-to-inmate marriages. Although there was testimony at the trial that some of the prison officials believe that the marriages between civilians and inmates were not necessarily a bad idea, the December 1983 regulation has to be interpreted as also regulating marriages between civilians and inmates. The troubling aspect about such a regulation is that it is within its reach to affect civilian prospective spouses with the result that the regulation seems to violate the spirit of *Procunier v. Martinez, supra.* These concerns could be laid to rest with the acknowledgment that the dangers of physical contact inherent in the association of inmates and their visitors is greater than the dangers surrounding inmate-to-civilian correspondence. This factual situation is similar to that of inmates who do not have a constitutional right to have contact visitation and/or interviews with the media even though civilian rights are implicated in those situations. *Pell v. Procunier,* 417 U.S. at 827; *Block v. Rutherford,* 468 U.S. at 588-589. In each one of those cases, this Court carefully weighed the penological justification for the regulations and found that the means were rationally related to the goals. The same can be done in the present case.

III.

The Trial Court's findings of facts were clearly erroneous in that they were insufficient to support the order of the court and proceeded from an erroneous conception of the applicable law.

In the present case, the trial court ordered that the parties confer and prepare a suitable consent decree in accordance with the opinion of the court. *Safley v. Turner, supra,* 586 F.Supp. 587, 597 (W.D. Mo. 1984). This was done, and the regulations which appear in the Joint Appendix are the result of the court order. The court did

not order any modifications in any of the defendants existing regulations concerning correspondence among civilians and inmates.

A finding of fact is deemed to be clearly erroneous if it is not supported by substantial evidence, if it proceeds from an erroneous conception of applicable law, or if in consideration of the entire record, the reviewing court is left with a definite and confirmed conviction that a mistake has been made. *Anderson v. City of Bessemer City,* ..... U.S. ....., 105 S.Ct. 1504, 1511 (1986); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 855 (1982). Controversial sometimes in its identity when compared to a conclusion of law, the findings of facts are, nevertheless, the building blocks upon which any trial court opinion is based.

It is the traditional view that injunction is a remedy not lightly granted, but is a remedy which needs to be molded by the use of the discretion of the court. *Hect v. Bowles,* 321 U.S. 321 (1944). Since injunctive remedies are not punitive in nature, a court may take into effect the good faith of defendants when it applies its remedy. *Id.* at 325-326. Among the various factors to be proven to and weighed by the court, the plaintiff has to demonstrate whether there is a danger that the complained of conduct will be repeated and that harm will result. *Lewis v. S.S. Baune,* 534 F.2d 1115, 1124 (5th Cir. 1974), *reh. den.,* 545 F.2d 1299 (1974). In the present case, the findings of fact do not support the findings of the court because they were factually irrelevant to the conclusions of law and to the remedy of the court. Although the court made many factual findings concerning the practices of the defendant what at best can be characterized as negligent lapses by the defendant in the application of the then existing correspondence policy the court did not find any pattern or practice on which to rely to finding the defendants' regulation unconstitutional. Nor did the court in

this case order the defendants to change the manner in which it applied correspondence regulation regarding inmates and civilians. Without a finding that the complained of behavior is likely to reoccur, or is of such a continuing nature as to indicate a pattern or practice, an injunction should not be the appropriate remedy. *Rizzo v. Goode,* 423 U.S. 362, 375 (1976). This conclusion is especially compelling if the findings of facts support the court's assessment that the regulations were enforced in an "arbitrary and capricious" manner. *Safley v. Turner,* 589 F. Supp. at 596. That is a due process violation which needs more than a mere finding of negligence. *Daniels v. Williams,* ..... U.S. ....., 106 S.Ct. 662, 665 (1986).

Further, since the court was using an inappropriate standard of review, as argued in the previous two points, these findings of fact cannot help but be skewed by the incorrect perception of the applicable law. See *United States v. Singer Mfg. Co.,* 374 U.S. 174, 193 (1963); *Shull v. Dane, Kalman & Quail, Inc.,* 561 F.2d 152, 155 (8th Cir. 1977).

Without some sort of finding of something more than mere negligence on the part of mailroom employees, the violation of divisional or institutional regulation should not be used as a finding of fact for a division-wide injunction. This is illustrated by the following finding of fact:

> 5. There have been instances where the divisional correspondence regulation has been violated. For example:
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> a. Letters have been stopped without notice or explanation to either the correspondent or the recipient;
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> b. Mail to and from persons not incarcerated has been stopped or refused on factually incorrect grounds or without legitimate justification;
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> c. Mail to incarcerated family members has been refused or returned without notification or explanation;
>
> d. Mail with former inmates has been refused or returned without notification or explanation.

Safley v. Turner, supra, 589 F.Supp. at 591.

Theoretically, at Renz and at other mailrooms in institutions in the Division of Corrections, employees were suppose to supply a slip of paper with an appropriate box marked to notify an inmate that his mail had been stopped or some other action had been taken by the staff. As far as can be determined from the testimony of Peggy Collins (Vol. I, Tr. 130), Shirley Lute (Vol. III, Tr. 54), and P. J. Watson (Vol. IV, Tr. 203), some mail was stopped without any formal notice.[7] There was testimony, however, that others in any one of the situations outlined in 5(a) received notices or explanations.[8]

Concerning 5(b), there was testimony that mail from Cheryl Lovell to her nonincarcerated aunt, Alice Garnett, was stopped (Vol. I, Tr. 102). Also, Mannie Collins testified that while he was at another institution, not Renz, he was limited to one letter a day to some of his relatives (Vol. I, Tr. 139-141). Judy Henderson testified that mail from her father had been returned on the incorrect basis

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7. Robert Boessen also testified that he had had four letters stopped without notice, but had never contacted anybody at Renz concerning his belief (Vol. III, Tr. 20, 25). This impression is dissipated by the testimony of the intended recipient of the correspondence, Carlene Borden, who contacted the mailroom and was informed that they had not had any mail from Mr. Boessen, but said they would look for it (Vol. III, Tr. 30).

8. Sharon Lovell (Vol. I, Tr. 102) at various times (Vol. I, Tr. 121-122), Mannie Collins (Vol. I, Tr. 139-141), Loretta Danforth (Vol. I, Tr. 203), Alice Garnett (Vol. II, Tr. 17-18), Nancy Roe (Vol. III, Tr. 45), Shirley Lute (Vol. III, Tr. 53), Joyce Epley Roberts (Vol. III, Tr. 65), Mary Webb (Vol. III, Tr. 88, 91), Judy Henderson (Vol. III, Tr. 185, 1982, 218-219), William Quillium (Vol. III, Tr. 253), Leonard Safley (Vol. IV, Tr. 169), Janet Kamerman (Vol. IV, Tr. 214), and, it is assumed, Diane Finley (Vol. IV, Tr. 221). All received notice when their mail was stopped for any of the various infractions of the mail rule. The defendants have tried to note the instances thoroughly and accurately. If, however, there are unintentional errors, we feel confident that the plaintiff will bring them to the Court's attention.

that it was mistaken for mail from a prison. Finally, Earl Engelbrecht testified that because of racist remarks concerning Superintendent Turner, he had personally returned a letter to an inmate and indicated that she should not make racist comments about the superintendent. He indicated that he had never done that before or since, and it was because of his deep seated aversion to racism (Vol. V, Tr. 105-106). It is assumed that the court based this finding of fact on the fact that Alice Garnett's and Judy Henderson's relatives were not prisoners. As was testified to by Earl Engelbrecht, the manner in which inmates circumvented the mail rule was to send their letters to a civilian who would then change envelopes and send the letter into another prison (Vol. II, Tr. 147). In circumstances when it became apparent that civilians were assisting in the circumvention of the mail rule, the civilian mail was returned. In the present case, the staff could not remember why they had returned the mail from the Henderson family and Alice Garnett, but it was assumed that it was because they believed they were circumventing the rule. Further, inmates Loretta Danforth (Vol. III, Tr. 146-149, 155) and Bill Quillum (Vol. III, Tr. 236) and Len Safley (Vol. IV, Tr. 173) testified that they actively engaged in circumvention of the mail rules. Certainly that indicates that there was evidence to substantiate at least the fear that inmates were circumventing the mail rule was legitimate. The other instance of limiting the number of letters sent or received and the returning of the letter containing the racist comments was probably without legitimate basis. The question becomes whether isolated instances would seem to make this a reckless or malicious practice.

The evidence which substantiated finding 5(c), that mail to incarcerated family members had been refused, seemed to be based on Linda Thompson's testimony that she had been refused permission to write to a sister (Vol. I, Tr. 204). Shirley Lute testified that on occasion, her

son thought that mail was not getting through to her (Vol. III, Tr. 54), but other times that it would. Mary Webb testified that she had been approved to correspond by Mr. Engelbrecht, but that the letter had been returned (Vol. III, Tr. 98). But she never sought out Mr. Engelbrecht to clear up the confusion (Vol. III, Tr. 98).[9]

Finally, correspondence with former inmates was alleged to have been refused without notice. It is difficult to ascertain what testimony the court was relying on in this issue. It seems that Mary Webb testified that letters to a Ronnie Sowers who was on probation from the Renz Correctional Center were returned, but she never testified that she had any mail stopped without notice (Vol. III, Tr. 88, 91). It is possible that the court relied on the testimony of inmates who, during their attempts to get married, wrote to their fiancees on the streets and had letters returned (see Mannie Collins, Vol. I, Tr. 136, 140). This does not seem to be clear, from the record because Linda Thompson and Robert Thompson did not testify to any correspondence problems. Nancy Row indicated that no letters were ever stopped (Vol. III, Tr. 45). Joyce Epley Roberts indicated that no letters had ever been stopped (Vol. III, Tr. 65). Judy Henderson never testified that she had ever had a letter stopped without notice (Vol. III, Tr. 185, 192, 195) and that when she had sought approval to write to a newly released inmate, the request was approved (Vol. III, Tr. 218-219). It is also possible, that he based the finding of fact on Robert Boessen's statement that four of his letters had not gotten through to Carlene Borden (Vol. III Tr. 20). This would seem to conflict with Carlene Borden's testimony that she had contacted the mailroom, and they indicated they

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9. The approval rate for inmate-to-inmate correspondence when they were not related was approximately 25% (Vol. IV, Tr. 259-261). When relatives were involved, it was supposed to be blanket approval (Vol. V, Tr. 47-49).

had not received them. At any rate, it would seem to be an awfully thin broth in which to base a finding of fact which was the basis for striking down a division-wide correspondence policy. It would seem that, at least, this finding is unsupported by substantial evidence.

Although appellants would concede, in the proper deference to the decisions of the lower courts, that some inferences are permissible, this finding of fact takes the scheme too far. Factual findings should not be based on an erroneous conception of the law. *United States v. Singer Mfg. Co., supra,* 374 U.S. at 193; *Shull v. Dain, Kalman & Quail, Inc., supra,* 561 F.2d at 155. It was established that it was the appellants' policy to give notice to inmates whose mail was refused and to permit correspondence between inmates and their friends and family who were incarcerated. Although occasional instances of error may possibly provide a basis for a finding of negligence, they do not, and the court did not find that, these "instances" established a practice or pattern of abuse. There should be more to this finding than a mere showing of negligence, especially when the finding is used to strike down a regulation which covered 8,100 inmates and twelve institutions. In addition, 5(a), (b), and (d), although possibly and only technically relevant to the case as examples of possible violations of *Procunier v. Martinez,* 416 U.S. 396 (1974), they should not be used as evidence of constitutional violation or of an exaggerated response on the distinct issue of inmate-to-inmate correspondence. Frankly, the great majority of the letters which were returned, were returned because inmates were attempting to correspond with other inmates. The court seems to have assumed a constitutional violation before it found the regulation unconstitutional.

The Court also relied on its findings of fact in paragraphs six and eight which indicate that Renz's "more restrictive practice" was set out in the booklet and presented to each inmate upon arrival. Initially, it should be noted that the inmate correspondence regulation established a discretionary standard that non-related inmates *may* correspond with each other. This language leaves the discretion to permit correspondence up to the individual caseworkers. The much maligned orientation booklet given to the inmate on arrival correctly indicated that correspondence was permitted between related inmates. The regulation did not give any protectable constitutional interest to any inmate to correspond with non-related inmates. *Jones v. Mabry,* 723 F.2d 590, 593 (8th Cir. 1983). Thus, it is difficult to understand what is the legal result of having a more restrictive practice at this institution. In addition, Renz had unique problems, different from any other prison in the system. Renz was more restrictive because the department's regulations permitted institutional regulations to be adopted to suit the conditions at the institution (Vol. IV, Tr. 242).

Further, as was explained by the chief caseworker, Earl Engelbrecht, an assessment of best interest is made by reference to custody level, behavior, the potential correspondent, and whether or not the inmate receives visitation (Vol. IV, Tr. 258-260). In fact, there was considerable evidence, even the defendants' witnesses, that indicated that correspondence had been approved for non-related inmates (Vol. III, Tr. 218-219). Mr. Engelbrecht indicated that probably 25% of the requests were approved for non-related inmate-to-inmate correspondence (Vol. IV, Tr. 261). Interestingly enough this percentage was exactly the figure the appellants' expert indicated was the percentage of healthy correspondence in an unregulated situation (Vol. V, Tr. 22).

The Court's conclusion eleven misapplied the regulations of the Department of Corrections and assumed a constitutional violation. In the finding, the District Court found that inmate-to-inmate legal mail was "routinely opened, stopped, or refused in violation of Department

of Corrections' written rule." *Id.* at 591. Actually, this is an incorrect conclusion. A review of the Department of Corrections' rule on inmate-to-inmate legal mail is necessary. Legal mail is defined in the correspondence rule as:

> Letters from judges, courts, elected state and federal officials, officials of confining institutions, division and department administrators, parole board members, attorneys, and media representatives may be delivered to the inmate unopened, based on the return address on the outside of the envelope. Any letter in this privileged category of a suspicious or doubtful nature may be opened and inspected in the presence of the inmate to whom the mail is addressed.

20-118.010(2)(B) (J. Appendix 35).

By definition, the mail sent between inmates does not fall under any category of legal mail, thus, it does not merit automatic privilege. Naturally, since "legal" could be used as a method to circumvent the mail, inmates had to be approved prior to gaining this privilege. Inmates do not have a right to affix the legend "legal" and send a letter unless it was within the protected area. If inmates were corresponding legally, they were permitted to correspond only after they had been approved (Vol. V, Tr. 65-66). The appellants retain the right to review mail even if its subject matter is arguably legal if it does not fall within the protected class of mail and is not clearly designated as such. *Jenson v. Klecker,* 648 F.2d 1179, 1182 (8th Cir. 1981). (*See also,* Vol. V, Tr. 69.) To permit inmates to control the approval process is asking for trouble.

The finding contained in paragraph nine, although having a minimal amount of evidence to support it, is an incorrect basis for a finding that the Department of Corrections' correspondence policy violates the constitutional rights of inmates. Although regrettable, there was evidence that Earl Engelbrecht had personally returned a

letter which contained racist comments about Mr. Turner. This finding highlights the frailty of the findings of fact in this case. This finding of fact is material to the issue of what restrictions inmates should be on inmate-to-inmate correspondence. There were no damages found, nor any claims that the civilian-to-inmate correspondence policy was in any way constitutionally infirmed. What this finding does demonstrate is that even with a "constitutional" regulation, employees are going to make mistakes. Further, it would seem that Mr. Engelbrecht's mistake is an issue best resolved in another lawsuit; it should not be used to substantiate the restrictions under which inmates should be able to correspond with each other.

The Court found that correspondence with inmates had been denied solely on the basis of inmate marital status and had been denied despite "evidence" that the correspondence was a desire simply to maintain a wholesome friendship. This finding completely ignored the unrefuted evidence by the appellants' witnesses. The friction that is caused as a result of a "love triangle" and the maintenance of "wholesome" inmate friendship is the basis for a large amount of violence within the prison system (Vol. V, Tr. 12-14). There is no basis in testimony for this assertion. In fact, the friendships that are developed in prisons are, on the whole, not wholesome (Vol. III, Tr. 164). Although we would all like it to be otherwise, the evidence is that inmates do not have a good effect on each other.

Concerning finding number thirteen, it should be noted that, under the limited controls exercised under the regulation, the employees at Renz have been able to control the outgoing and incoming mail. There was a great amount of unrefuted testimony, however, which indicated that an increase in correspondence would mean that the employees would have to forego the scanning of each piece of inmate-to-inmate mail and only scan selected pieces (Vol. IV, Tr. 78, 108). This is the procedure in the Kansas

system, and it was implicated as actually having contributed to an escape (Vol. III, Tr. 158-160). It seems fundamentally incongruous to have a finding of fact that inmate-to-inmate correspondence could be controlled when the testimony was absolutely contradictory (Vol. IV, Tr. 42).

It is the position of the appellants that the findings of fact which support the court's opinion concerning inmate-to-inmate marriages are unsupported by the record and are insufficient to support the conclusion that the regulation of the Department of Corrections violates inmates' rights. The findings numbered fifteen through twenty-one in which the court finds the support for its legal opinions are based on an incorrect review of the record and on an incorrect assumption of the applicable law.

Superintendent Turner made decisions to disapprove marriage requests for more important reasons than a "protective" attitude. Inmates Watson's and Henderson's requests were denied because of concerns for security. Row, Thompson, Roberts and Finley had their requests denied for the mixed reasons of security and rehabilitation. The Court did not challenge the good faith, sincerity or even legitimacy of any of these decisions, it merely would have made a different decision.

Illustrative of the faulty premises on which the Trial Court based its finding is the notion that the Court *can* substitute its judgment for the judgment of the prison officials even on "tactical matters" if there is arguably a less restrictive alternative to be used (Vol. IV, Tr. 27-28).

CONCLUSION

In conclusion, the Courts below were in error when they rendered their decisions. The judgment should be reversed and the injunction dissolved.

No. 85-1384

In The
Supreme Court of the United States
October Term, 1986

WILLIAM R. TURNER, et al., and
DR. LEROY BLACK, et al.,

Petitioners,

v.

LEONARD SAFLEY, et al., and
MARY WEBB, et al., individually and as a
class of similarly situated people,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly ruled that the District Court's findings of fact were supported by substantial evidence and are not clearly erroneous?

2. Whether the Court of Appeals correctly ruled that the rules and practices of the Missouri Department of Corrections governing prisoner correspondence violate inmates' First Amendment rights?

3. Whether the Court of Appeals correctly ruled that the rules and practices of the Missouri Department of Corrections concerning prisoner marriage violate inmates' fundamental right to marry?

LIST OF ALL PARTIES

All parties are not named in the caption of Petitioners' Brief. In addition to Leonard Safley and Mary Webb, Pearl Jean Watson-Safley, Robert E. Thompson, Linda Scott Thompson, William Quillun, Diana Finley, Nancy Row, Judy Henderson, Shirley Lute, Connie Flowers, Patrick Barks, and Alice Garnett are all named class plaintiffs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

Statutes and Regulations

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

I. Course of Proceedings

Plaintiff Leonard Safley filed his initial complaints pro se on October 16, 1981, and on January 29, 1982. The second complaint, for declaratory and injunctive relief, was the forerunner to the class action allegations of plaintiffs' amended complaint on which the case was tried. Joint Appendix (hereinafter J.A.) at 6-17.

Early in March, 1982, counsel was appointed to represent Mr. Safley in both cases. Subsequently, Pearl Jean Watson, an inmate of Renz Correctional Center (hereinafter Renz), was granted leave to intervene as a party plaintiff.

On March 26, 1982, plaintiffs appeared in District Court for a hearing on their motion for a preliminary injunction. That hearing was mooted when the Honorable Howard F. Sachs, District Judge, allowed the use of his courtroom for the marriage of those plaintiffs.

Defendants opposed the marriage of Mr. Safley (age 54) and Ms. Watson (age 34) even though they satisfied the requirements of Missouri law for a valid marriage and the extant regulation of the Department of Corrections did not give prison authorities the right to prevent inmate marriages. The trial judge permitted the use of his courtroom because "[i]f the court had recognized a substantial state interest in preventing the marriage, permission would, of course, have been denied. No such interest was, or has been, presented." *Safley v. Turner*, 586 F. Supp. 589, 594 n.1 (W.D. Mo. 1984).

The Safleys' claims were not entirely mooted by the marriage. In the course of investigation and discovery,

it became clear that their experience with correspondence and marriage was illustrative of a much larger problem facing inmates in the Missouri prison system, particularly for inmates at Renz.

After consulting with numerous inmates at Renz and at other institutions, plaintiffs' counsel obtained leave to file an amended complaint joining additional parties, certifying a class action under Federal Rule of Civil Procedure 23(b)(2), and clarifying plaintiffs' theories of recovery for injunctive and declaratory relief. J.A. at 2, 6-17.

The evidence was presented to Judge Sachs in late February and early March of 1984. In the five days of trial, the Court observed the examination of 32 witnesses and received stipulations concerning the testimony of 21 other witnesses whom plaintiffs were prepared to call. The District Court requested that counsel enter into those stipulations in order to shorten the trial and avoid repetitive proof by plaintiffs. Vol. IV at 216.

After the trial, both parties submitted proposed findings of fact and conclusions of law. In addition, plaintiffs' counsel submitted affidavits and exhibits supporting the belief that some of plaintiffs' witnesses had been harassed by prison employees as a result of their trial testimony. Plaintiffs' Post-Trial Brief (filed March 23, 1984).

The District Court's opinion on the merits, filed on May 7, 1984, J.A. at 4, adopted most of the factual findings requested by plaintiffs and implicitly rejected the proposed factual findings and conclusions of law offered by defendants. The Court instructed the parties to attempt to negotiate a suitable decree in accordance with

his opinion. The Court also ordered defendants to refrain from harassing inmates who had participated in the suit and who were "reasonably concerned that their testimony made them the subject of retaliation or harassment by employees of the Department of Corrections." 586 F. Supp. at 593, 597.

In response to the Court's Order, the Department of Corrections drafted proposed regulations concerning inmate marriage and correspondence. The regulations were approved by counsel for both sides and were submitted to the Court with a mutually acceptable proposed Order. On June 18, 1984, the Court entered that Order, thereby requiring the Missouri Department of Corrections to adopt the revised regulations the Department had drafted. J.A. at 4-5, 51-59.

Defendants appealed, and the Court of Appeals for the Eighth Circuit unanimously affirmed on November 19, 1985. The Court below "thoroughly examined the record and found substantial evidence to suport each finding of fact," and therefore affirmed those findings. *Safley v. Turner*, 777 F.2d 1307, 1315 (8th Cir. 1985). The Court also approved Judge Sachs' legal analysis. *Id.* at 1313, 1314.

Significantly, the record reflects no attempt by defendants or the Missouri Department of Corrections to stay enforcement of the revised regulations adopted by the Department. The record is also barren of any effort by defendants or the Missouri Department of Corrections to modify the new rules in any substantive way. Missouri prisons have thus been operating under the revised marriage and correspondence regulations for over two years.

II. Statement of Facts

The Statements of Facts in Petitioners' Brief and the Solicitor General's Brief are remarkable for ignoring all evidence which supports the District Court's findings of fact or that conflicts with defendants' legal position. Defendants and amici also present as "uncontradicted" gospel truth testimony by defendants' witnesses on direct examination which apparently was deemed non-credible by the trier of fact. Their one-sided presentation and argument that there was no pattern or practice of abuse, Petitioners' Brief at 41-42, makes it necessary to review in some detail the evidence supporting the opinions of the Court of Appeals and the District Court.

The Missouri Division of Adult Institutions operates 12 adult correctional facilities. Transcript Vol. III at 259 (hereinafter Vol. — at —). When this case was tried, Renz housed a few male inmates and most female inmates, except for a majority of those designated for minimum security. Minimum security female prisoners resided at Chillicothe Correctional Center (hereinafter Chillicothe). Vol. II at 70; OFFICIAL MANUAL OF THE STATE OF MISSOURI (1985-86) at 334. A recent transfer of inmates to Chillicothe left only certain minimum and maximum security female prisoners currently residing at Renz. Petitioners' Brief at 6 n.3.

Defendant William Turner is Superintendent of Renz. Defendant Earl Englebrecht is Caseworker Supervisor at Renz. Defendant Betty Bowen is a Renz caseworker dealing with female inmates. Defendant W. David Blackwell was the Director of the Division of Adult Institutions until shortly before trial, when he was succeeded by Donald

Wyrick, long-time warden of the largest state facility, the Missouri State Penitentiary (hereinafter MSP).

Although defendants make much of the unique situation at Renz, the Department of Corrections continues to boast that it has made the necessary "accommodations . . . to meet maximum security needs" at that institution. OFFICIAL MANUAL OF THE STATE OF MISSOURI at 334. Despite the "minimum security perimeter" at Renz, there have been only two escapes since 1979. Vol. II at 74.

Plaintiffs have repeatedly acknowledged the legitimate security concerns of the Department of Corrections. Plaintiffs' Amended Complaint, J.A. at 16; Vol. I at 11-12. Plaintiffs further acknowledged the Division's right to impose reasonable restrictions on marriage ceremonies, to counsel inmates concerning proposed marriages, and to read all non-privileged correspondence. J.A. at 16-17; Vol. I at 5; Vol. IV at 40-41.

In light of these accommodations, plaintiffs take vigorous exception to the inaccurate suggestion that they demand "virtually unrestricted correspondence," Iowa's Amicus Brief at 2, and to the frequent reference to the specter of "prison gang violence" and other supposed evils mentioned in Petitioners' Brief and the amici filings which support it. There was *no* evidence presented at trial tying correspondence or marriage to gang activity in Missouri prisons.

Instead, defendants only speculated about problems that inmate-to-inmate correspondence "could" cause. In response to one such question, defendant Blackwell suggested that something called "carte blanche correspon-

dence" could be misused by prisoners, including gang members. Vol. III at 264-65. Plaintiffs have never suggested they wanted "carte blanche correspondence."

Similarly, there was no evidence that the deaths at MSP mentioned by defendants, Petitioners' Brief at 7, were related to either correspondence or marriage; that any of plaintiffs' witnesses were involved in any way in gangs or gang violence; or that more than a small percentage of inmates in the Missouri Department of Corrections belongs to gangs. Vol. IV at 79. Indeed, there was no evidence in the District Court about the number of gang members supposedly housed in Missouri prisons.

The Solicitor General's Brief cites a 1985 Justice Department study suggesting that Missouri prisons hold 550 gang members who constitute 6.7% of its prison population but who cause 90% of the "problems" in Missouri correctional facilities. Solicitor General's Brief at 20 n.13. This study is not in the record and was not considered by the courts below. Moreover, neither the courts below nor plaintiffs have had the opportunity to confirm the accuracy of those representations.

Assuming for the moment that the report is accurate, it suggests (1) Missouri has been able to identify its gang members; (2) 93.3% of Missouri prison inmates do *not* belong to gangs; and (3) those 93.3% of Missouri offenders cause only 10% of the "problems" faced by correction officials. In other words, the study actually confirms the evidence below that the vast majority of inmates who wish

to correspond and/or marry do not threaten the security or order of Missouri prisons in any way.[1]

A. Correspondence

The Missouri Department of Corrections' inmate mail rule, J.A. at 33, purportedly governed all prisoner correspondence. As the District Court found, however, the correspondence regulation had been violated repeatedly at Renz and elsewhere within the Department of Corrections. 586 F. Supp. at 591.

1. *Inmate-to-Civilian Correspondence*

Defendants' focus on inmate-to-inmate correspondence studiously ignores the pattern of First Amendment violations revealed by plaintiffs' proof of interference with correspondence between inmates and nonincarcerted persons. Defendants contend that the District Court's findings on these points were not supported by substantial evidence. They ignore the testimony of numerous witnesses whose

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[1]It is plaintiffs' understanding that the facts presented to the Court in the Brief and "Lodging" filed by the Texas Attorney General as amicus curiae present an incomplete and possibly misleading picture of the Texas Prison system. Counsel for the *Guajardo* plaintiffs have sought leave to file an amicus curiae brief to correct the record concerning proceedings in that case.

Plaintiffs object to the filings by the State of Texas because the factual disputes raised have no bearing on this case. Petitioners' counsel agrees the controversy generated by the Texas amicus curiae brief is inappropriate because he has refused to consent to an amicus response by the *Guajardo* plaintiffs. See August 27, 1986, letter from Henry T. Herschel, Missouri Assistant Attorney General, to Ann Lents, reproduced in the *Guajardo* Plaintiffs' Amicus Brief. Nevertheless, plaintiffs defer to the amicus curiae brief of the *Guajardo* plaintiffs for a response to the Texas Attorney General's factual allegations.

mail to and from civilians was refused in violation of the Division rule, the Renz institutional rule, and *Procunier v. Martinez,* 416 U.S. 396 (1974). Finding Nos. 5(b), 5(d), 586 F. Supp. at 591; Vol. I at 102, 104, 136-40; Vol. II at 16-18; Vol. III at 91-92; Vol. IV at 214, 220; Vol. V at 126.

For example, mail from Judy Henderson's brother, father, and civilian friends was refused by Renz on the factually incorrect ground that the correspondents were incarcerated. Vol. III at 185, 192-94. Defendants assert —without any citation to the record—that they believed that Judy Henderson's family and Alice Garnett were assisting in the circumvention of the mail rule and, thus, they had a legitimate basis for refusing or returning mail. Petitioners' Brief at 44. There is no such evidence in the record, and the notices given to Ms. Henderson at the time the mail was refused indicated it was "unauthorized correspondence from another correctional facility," not that it contained contraband, *i.e.,* a letter or message from an unauthorized person. *See, e.g.,* P. Ex. 6, Vol. III at 192; P. Ex. 7, Vol. III at 192, 193; P. Ex. 16, Vol. III at 194.

In order to evaluate the sort of correspondence which defendants find so threatening, plaintiffs introduced into evidence numerous letters which had been stopped by Renz. As an example, plaintiffs invite the Court's attention to Plaintiffs' Exhibit 16, Vol. III at 192, attached to this Brief as Appendix (hereinafter App.) A.

Ms. Henderson's innocent message to her younger brother was stopped by defendant Englebrecht on the factually incorrect ground that her brother's home address

was a prison. Vol. III at 194. Even if Englebrecht had been correct, the divisional rules specifically provided that "[c]orrespondence with immediate family members who are inmates in other correctional institutions *will be permitted.*" J.A. at 34 (emphasis added). Englebrecht repeatedly violated his Department's rule and also admitted that "[t]here was nothing in the content of the letters that was objectionable." Vol. V at 84.

Similarly, plaintiffs invite the Court's attention to Plaintiffs' Exhibit 72, Vol. IV at 185, App. B. This Hallmark birthday card from Leonard Safley's elderly mother to Ms. Watson was refused by Renz solely because Mr. Safley's mother signed the card "We Love You very much—Mama Nez & Len." Vol. V at 94.

2. *Inmate-to-Inmate Correspondence*

The stated purpose of the Renz inmate mail rule recognized the importance of communication to prisoners' rehabilitation:

> Correspondence with members of an inmate's family, close friends, associates, and organizations is beneficial to the morale of all confined persons and may form the basis of good judgement [sic] in the institution and in the community. It will be encouraged and supported.

J.A. at 38. *See also* J.A. at 33.

The portion of the rule which was used by defendants to justify the refusal of inmate-to-inmate mail provided that "correspondence may be permitted between non-family members if the classification/treatment team of each inmate deems it in the best interests of the parties involved." J.A. at 34. The focus of the inquiry on the

"best interests" of the prisoner corroborates defendant Englebrecht's testimony that the purported purpose of the rule was to encourage rehabilitation. Vol. IV at 259.[2]

In contrast to these inspired statements of purpose, the rule as practiced at Renz was that inmates were not permitted to write or receive mail from inmates who were not immediate family members. Finding No. 6, 586 F. Supp. at 591. The practice was set forth in the Renz Inmate Orientation Booklet presented to each prisoner upon his or her arrival at the institution. *Id.*

The District Court's findings clearly rejected defendants' trial testimony that inmate-to-inmate correspondence was analyzed on a case-by-case basis by a classification/treatment team. Vol. I at 88-89; Vol. IV at 259-60. The District Court also apparently did not believe defendant Englebrecht's guess that 25% of the requests were approved. Vol. IV at 261.

The rule practiced at Renz banning inmate-to-inmate correspondence was widely known throughout the Missouri prison system. Finding No. 6, 586 F. Supp. at 591. A memorandum posted at Chillicothe warned inmates that correspondence with Renz was not allowed. Vol. I at 42-43. Numerous witnesses were told upon their arrival at other institutions that they could not write to Renz because Renz would not accept correspondence from another inmate. Vol. I at 106, 112, 118, 129, 146; Vol. II at 72, 116-

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[2]Thus, the Solicitor General's statement that "[t]he testimony at trial showed that Missouri prison officials promulgated the correspondence regulation for security reasons," Socilitor General's Brief at 20, is false. There was no evidence that the *purpose* of the "best interests" standard was security.

17; Vol. IV at 130. Other witnesses testified that various Renz officials, including Superintendent Turner, told them they would not be allowed to write inmates in other institutions, not even to relatives. Vol. I at 101, 203-04; Vol. IV at 215-16.

Some of the defendants in this case admitted that the policy at Renz is a blanket prohibition of inmate-to-inmate correspondence except for family members. Defendant Bowen twice testified that the Renz correspondence policy permits inmate correspondence only with immediate family members. Vol. II at 149, 159. Only after prompting did she recall the Department of Corrections' "best interest" party line. *Id.* at 149.

Superintendent Turner admitted that when Billy Younts asked permission to correspond with Loretta Danforth, Turner told him "[y]ou know what the policy states." Vol. I at 94. Turner and Englebrecht both conceded that the current and former Renz inmate orientation manuals state that inmate-to-inmate correspondence would be "permitted with immediate family members only." Vol. III at 7-8; Vol. V at 78; P. Ex. 91, Vol. III at 4-5; P. Ex. 92, Vol. III at 5. *See also* Vol. V at 76-77.

Mr. Englebrecht threatened Diana Finley with punishment if an MSP inmate mailed her any additional correspondence. Vol. V at 86. Even after this trial was completed—after defendants claimed that correspondence decisions were made thoughtfully on the "best interest" standard—Englebrecht denied correspondence between inmates *solely* on the grounds of the institution's "policy." P. Exs. 103 and 105, attached to Plaintiffs' Post-Trial Brief (filed March 23, 1984).

There was absolutely no evidence that any of plaintiffs' witnesses were gang members or that any of the correspondence which had been stopped or refused by Renz threatened the security or order of any prison in any way. The evidence at trial established that "[i]nmates at most institutions in the Missouri Correctional System are permitted to correspond with inmates in most other institutions." Finding No. 8, 586 F. Supp. at 591. *See* Vol. I at 107; Vol. III at 103, 109, 117; Vol. IV at 215.

The Renz staff has been able to scan and control all mail, including the inmate-to-inmate correspondence which is allowed. Finding No. 14, 586 F. Supp. at 592. Mr. Englebrecht testified that he was able to handle all suspicious correspondence coming to and from the institution in less than one hour each day and that it does not cause him a "great deal of problems." Vol. V at 70. In that one hour, he personally scanned *all* inmate-to-inmate correspondence, including letters between family members. *Id.* at 96-97, 99-100.

Defendant Blackwell also testified that the Department of Corrections has a computerized enemies list that could be utilized to help keep track of inmate-to-inmate correspondence. Vol. III at 264-65; Vol. IV at 95-96. Defendants' expert Sally Halford testified that, over her personal objection, her superiors in the Kansas Department of Corrections maintain an "open" correspondence policy; she believed it causes too many problems to attempt to restrict inmate-to-inmate correspondence. Vol. III at 168. She further opined that one reason prison officials do not want to read all the inmate-to-inmate correspondence is because it would be "very boring." Vol. III at 176.

The evidence presented also supported the finding that "[c]orrespondence between inmates has been denied despite evidence that [it] was desired simply to maintain wholesome friendships." Finding No. 13, 586 F. Supp. at 591-92. Numerous inmates testified that they wished to correspond with various inmates at other correctional facilities for the sole purpose of maintaining friendships and relationships. Vol. I at 128, 146-47, 204-05; Vol. III at 41-43, 51-52, 87-90, 103, 115, 190-92; Vol. IV at 214. Even defendant Blackwell conceded that some inmate-to-inmate correspondence would not involve illegal activities and that some inmates who are now denied the right to correspond would not write about improper or illegal activities. Vol. IV at 83, 113.

The Court may be curious as to the sort of correspondence which defendants contend is so threatening to the security of Renz. Attached as Apps. A, C, and D are but a few examples of letters stopped by Renz officials on the ground that they were unapproved inmate-to-inmate correspondence.

Plaintiffs' Exhibit 60, Vol. IV at 169-70, App. D, is a letter written by Mr. Safely to Ms. Watson prior to their marriage. It was reviewed and specifically approved for delivery by Mr. Safley's caseworker at the Tipton Pre-Release Center, but Renz *still* refused to deliver the letter to Ms. Watson. Vol. IV at 168-69. *See also* P. Exs. 58, 59, 61, 62, 63, Vol. IV at 168, 170.

Plaintiffs' Exhibit 102, Vol. V at 77, App. C, is a playful "Wanted Poster" Rudy Christensen, an inmate at Missouri Eastern Correctional Institution, tried to send his fiancée Susan Hosna to express his affection for her. His

missive was approved by his caseworker at Missouri Eastern, but stopped by Renz. Vol. III at 117; Vol. V at 77. Plaintiffs invite this Court—as they invited Englebrecht, Vol. V at 77—to find anything in this correspondence that harms the security of Renz Correctional Center.

B. Inmate Marriage

Under the Inmate Marriage Rule in effect until December, 1983, "[t]he Missouri Division of Corrections and its institutions [were] not obligated to assist an inmate or inmates who wanted to be married while incarcerated." J.A. at 45. Nothing in the regulation, however, purported to give any prison employee power to prevent an inmate's right to marry the spouse of his or her choice.

Pursuant to this rule, inmates in Missouri correctional institutions, other than Renz or Chillicothe, often were allowed to be married upon request. Finding No. 18, 586 F. Supp. at 592; Vol. II at 172-175. Officials at both women's institutions, however, demonstrated considerable hostility toward the marriage requests of female inmates. Vol. I at 49-51, 53; Vol. V at 122-23.

Defendant Turner testified that, while nothing in the rule gave him the authority to deny marriages, he still believed he had the inherent power to deny the marriage of an inmate because of Missouri statutes "which allows me to control my institution." Vol. I at 70. Specifically, he claimed he could deny a marriage "[w]hen it has an effect on the control and security of that institution, yes, sir." *Id. See also id.* at 168-69.

When quizzed about the marriages he had denied, however, Turner dropped his reference to "security" and revealed his real criterion—he would approve only those marriages which he felt were "in the inmate's best interests." Vol. I at 75-76, 180, 184; Vol. IV at 199-200. This apparently reflected Turner's confidence in his ability to determine what was "best" for—to use his expression—"my women." Vol. III at 44-45; Vol. IV at 197.[3]

Defendant Turner's trial testimony as to why he denied these marriages differed significantly from what he told the inmates at the time. He recalled approving the marriage requests of only two female inmates since January of 1979. Vol. I at 213. The evidence revealed, however, that Turner had approved the marriage of only *one* female inmate—Kathy Kurtz—and she divorced her husband a few months after the marriage.

The other inmate, Joyce Epley Roberts was actually married while on furlough from Renz. Vol. III at 63. She testified that Mr. Turner had flatly refused her request to marry Orville Roberts: "He said there was a policy and procedure, and he got a book off the shelf and told me that it was against the policy and procedure for inmates to marry because they wouldn't last." *Id.* at 60. In contrast, Mr. Turner generally allowed male inmates to marry, at least until shortly before trial. Vol. II at 22.

Superintendent Turner refused permission to marry to many female inmates at Renz on the unexplained ground that the proposed marriage was not in their "best inter-

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[3]Mr. Turner is a high school graduate and has some college credits in business administration and management acquired "through various training programs." Vol. I at 64; Vol. II at 23-24. He joined the Department of Corrections as a guard and worked exclusively with male inmates before coming to Renz. Vol. I at 64-65.

est." Finding No. 17, 586 F. Supp. at 592; Vol. I at 76, 180, 184; Vol. III at 36; Vol. IV at 199-200, 218. Others were simply told that the requested marriage would not be allowed, Vol. I at 206-07, or that marriage was "against policy and procedure." Finding No. 21, 586 F. Supp. at 592; Vol. III at 60. This unexplained rationale prevailed even after the fiancé was released from custody, Vol. III at 38, and even when prison officials responsible for the male inmates had approved the marriage. Vol. I at 206-07, 210-12; Vol. III at 247-49.

Unfortunately, inmates could not rely on the Department of Corrections' grievance process to protect them from the arbitrary exercise of Turner's self-declared authority to deny inmate marriage requests. Defendant Blackwell, the former Director of the Division of Corrections, admitted that his usual practice upon receiving an inmate's letter of complaint about a Superintendent's treatment was to have the target of the grievance write the response for his signature. Finding No. 34, 586 F. Supp. at 593; Vol. IV at 6-7, 59-60. A similar practice occurred when a formal grievance was filed with the Director. *Id.*; Vol. IV at 52-53.

Moreover, the District Court found that Superintendent Turner occasionally interfered with the grievance process and inmates have occasionally been harassed or threatened if they pursued grievances in an attempt to exercise their correspondence and marriage rights. Finding Nos. 31 and 35, 586 F. Supp. at 593. Uncontroverted evidence showed that Superintendent Turner interfered with the grievance process by first threatening to "trash can" a grievance filed by an inmate, Vol. III at 60, and then running it through a paper shredder. *Id.* at 120-21.

On December 1, 1983—shortly before the scheduled trial date—the Department of Corrections promulgated a new marriage regulation placing the burden on the inmate to provide a "compelling" reason to allow the marriage. Finding No. 16, 586 F. Supp. at 592; J.A. at 47-48. The term "compelling" was not defined, and it applied equally to inmate-to-civilian marriages and to inmate-to-inmate marriages. Vol. I at 217; Vol. III at 281.

At trial, each defendant seemed to have his own definition of "compelling." Defendant Turner thought it meant that the inmates had to prove the fiancé had a prior relationship with the inmate in which "they [had] lived together or been in a paramour situation for several years" or where a child was "involved" *and* that it was a "positive situation." Vol. I at 215-16. Mr. Blackwell opined that "[c]ompelling reasons typically are things like if there is impending death of a proposed spouse, if there are children that could be affected in a negative fashion if the marriage were not allowed to be culminated. Financial reasons...." Vol. IV at 30.

Donald Wyrick testified that inmates could marry "[i]f two people were friends or living together as boy and girlfriend on the street and the girl was pregnant and they both came to prison and the girl wanted to marry the fellow so the baby would have a name and be a legitimate baby, that way...." Vol. IV at 237. On the other hand, Wyrick felt that an inmate's marriage to a civilian should be allowed "if no one sees any good reason why they shouldn't." *Id.* at 241. Wyrick also groused, "[t]here is no earthly sense in inmates marrying each other, anyway...." Vol. IV at 249.

Plaintiffs located only one inmate whose proposed marriage was apparently judged under that new standard because, beginning in December, 1983, all inmate marriage requests at Renz were delayed or forbidden because of the impending trial. Vol. III at 50, 125-26. The District Court found that this policy "has the appearance of penalizing the inmate population because some inmates have chosen to litigate." Finding No. 19, 586 F. Supp. at 592.[4] Vol. III at 50, 125-26.

Immediately after trial, Judy Henderson requested permission to marry ex-inmate Don Hagan "as soon as possible." P. Ex. 104, attached to Plaintiffs' Post-Trial Brief (filed March 23, 1984). Englebrecht's response indicates the sort of careful analysis of the inmate's "best interests" which goes into a decision to deny marriage at Renz:

> no.
>
> Due to policy for there is no compeling [sic] or substanteil [sic] reason at this time. The Judge's ~~order~~ request was just that a reguest [sic] presently. [sic]

Whether their marriage requests were judged on the "compelling" rule or under Superintendent Turner's claim

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[4]At trial, Turner claimed he had no substantive objections to the marriages of either Shirley Lute or Steven Carver and had promised Mr. Carver that he would allow his marriage "after this [suit] is settled." Vol. I at 172-74; Vol. III at 126-27. Yet, when the Court suggested that the suit should not further delay any marriages, Turner backtracked, insisting that he would have to "take another look" at the requests. Vol. II at 137-42. Permission was finally granted more than a month later, and only after plaintiffs' counsel complained to the Court about the inordinate delay in having the marriages approved. Plaintiffs' Post-Trial Brief at 7-8 (filed March 23, 1984).

of "inherent authority," female inmates at Renz have been unable to explain or justify their marriages to Mr. Turner's satisfaction or prove that they are a "safe gamble." Petitioners' Brief at 31-32.

Significant testimony from Blackwell established that the Department of Corrections could handle any security problems arising from inmate marriages. Vol. IV at 35, 58-59, 97. The most challenging security "issue"—transportation of one inmate for an inmate-to-inmate marriage—evaporates when compared to the regular transportation of inmates between Renz and the other correctional facilities within the Missouri system for medical and dental care and transfers. Vol. IV at 205; Vol. II at 24-26.

In addition, the Department transports married or related inmates that are permitted to visit each other each quarter and delivers inmates for court appearances. Vol. IV at 97. The Division of Corrections had been able to deal with any security problems arising from the transportation of inmates. Vol. IV at 97, 233-34.

Significantly, the inmates who persevered in their desires to be married over defendant Turner's objections now enjoy happy marriages. *See, e.g.*, Vol. I at 208; Vol. III at 76, 80; Vol. IV at 114. The Watson-Safley marriage was beneficial to Ms. Watson and improved her attitude towards incarceration. Vol. IV at 208, 256.

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SUMMARY OF THE ARGUMENT

I. The Findings of Fact

In five days of trial, the District Court had ample opportunity to judge the credibility of defendants and the sincerity of their explanations for banning certain prisoner correspondence and forbidding most inmate marriages. The Court witnessed vigorous cross-examination of defendants and heard testimony from dozens of inmates who challenged their truthfulness.

The trial court heard credible testimony supporting factual findings that prison administrators threatened inmates who attempted to exercise their correspondence or marriage rights with the loss of various privileges and the custody of their children. 586 F. Supp. at 593. Prisoners who filed grievances or who testified on these subjects became the subject of harassment and threats by corrections employees. *Id.* The trial court received evidence that Superintendent Turner shredded an inmate's marriage grievance and told one plaintiff that "we could get all the court orders we wanted, that he didn't have to honor them."

Based on his evaluation of all the evidence, including defendants' credibility, the District Court made detailed findings of fact generally accepting plaintiffs' view of the evidence and ruling the marriage and correspondence issues in plaintiffs' favor. The Court of Appeals reviewed the trial court's findings and found them supported by substantial evidence and not clearly erroneous.

Petitioners now ask this Court to review the entire record for a second time without making a "very obvious

and exceptional show of error." *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). The essence of defendants' request is that the Court should order the courts below to accept as true defendants' testimony so that they may win the case.

Defendants' invitation to rewrite the lower courts' findings must be declined.

II. Correspondence

The decisions of this Court have consistently (1) emphasized that inmates retain those constitutional rights which are not inherently inconsistent with their status as prisoners and (2) required an accommodation between legitimate interests of corrections officials and the constitutionally protected rights of their charges. This case involves the conflict between inmates who wish to correspond for wholesome and innocent purposes and prison administrators who assert the power to ban all inmate correspondence if they so desire.

The Missouri Department of Corrections mail rule prohibited correspondence between inmates who were not immediate family members unless corrections officials decided that the communication was in both inmates' "best interests." At Renz, the rule was applied to ban correspondence with inmates at other institutions. Plaintiffs proved that much correspondence was stopped "in accordance with policy" even when the content of the letter was innocent and did nothing to harm the prison's security or rehabilitation interests in any way.

Before this Court, defendants argue for a rule of virtually complete deference to prison officials who ration-

alize their denial of recognized constitutional rights. If defendants have their way, a healthy respect for the opinions of corrections officials would be elevated to a nearly unreviewable presumption that prison administrators may do as they please in restricting or denying inmates' constitutional rights as long as they claim to have a good reason.

Several lower courts have recognized, however, that acceptance of the standard of review advocated by defendants

> would be an abrogation of our responsibility as judges . . . . Balancing the wisdom of judicial deference against the need for courts to involve themselves in preserving precious liberties is a task of inordinate difficulty. But face it we must if we are to discharge our arduous and delicate duty as protectors and defenders of the Constitution.

Abdul Wali v. Coughlin, 754 F.2d 1015, 1018 (2d Cir 1985) (Kaufman, J.).

Corrections officials cannot be allowed to deprive inmates of the core of recognized rights, such as innocent speech and central religious practices, unless they can establish that the particular restriction is necessary to further an important governmental interest and that the limitations on fundamental rights caused by the restriction are no greater than necessary to effectuate that objective. On this record, where defendants' security concerns were exaggerated, where the corrections officials repeatedly violated their own regulations, and where inmates who attempted to exercise their rights were harassed and threatened, the courts below properly discharged their duty to protect inmates' constitutional rights. *Martinez*, 416 U.S. at 403.

III. Marriage

Defendants refused to allow adult inmates to marry even though they satisfied Missouri's statutes governing marriage. The regulation which purported to justify the marriage ban required inmates to establish a compelling reason for a marriage; what would be "compelling" was not defined, although the term apparently required at least a pregnancy created before incarceration.

Marriage is a recognized fundamental right that is not inconsistent with incarceration. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Bradbury v. Wainwright*, 718 F.2d 1538, 1540 (11th Cir. 1983). Interference with this right "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388.

Defendants once again challenge the application of this standard by the courts below and admit of virtually no limit on the power of prison officials to deprive inmates of fundamental rights such as marriage. Their effort to explain particular denials of marriage, however, was rejected by the courts below because the State's legitimate concerns could be advanced by less restrictive means.

Time has proven that defendants' rehabilitation and security concerns were overstated. The marriages that occurred over defendants' paternalistic objections have endured.

In the more than two years since the revised regulations became effective, defendants have not found it necessary to seek any modification of those rules. With the

gentle prodding of the federal courts, Missouri prisons can accommodate the exercise of inmates' core constitutional rights.

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ARGUMENT

I. THE DISTRICT COURT'S FINDINGS OF FACT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE NOT CLEARLY ERRONEOUS

Federal Rule of Civil Procedure 52(a) provides that "[f]indings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The "[f]indings of fact by a trial court sitting without a jury are *presumed correct* and cannot be set aside unless clearly against the weight of the evidence when viewed in the light most favorable to the prevailing party." *Pickens-Bond Construction Co. v. United Brotherhood of Carpenters & Joiners, Local 690,* 586 F.2d 1234, 1239 (8th Cir. 1978) (emphasis added).

As this Court has taught:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. . . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, — U.S. —, 105 S. Ct. 1504, 1511-12 (1985).

In accordance with these standards, the Court of Appeals found that the District Court's findings were not clearly erroneous. Petitioners now ask this Court to review the findings and the entire record for a second time, a task this Court normally refuses to undertake without a "very obvious and exceptional show of error." *Graver Tank,* 336 U.S. at 275. *See also Rogers v. Lodge,* 458 U.S. 613, 623 (1982). No such showing has been made here.

This Court cannot relive Judge Sachs' opportunity to observe the demeanor and judge the believability of the prison officials and their witnesses in the courtroom or under cross-examination. Their credibility undoubtedly affected the trial court's refusal to adopt most of the proposed findings submitted by defendants.

Plaintiffs' Statement of Facts cites to extensive evidence supporting the findings contested by defendants. This Court recently noted that

> [w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Anderson, 105 S. Ct. at 1512.

Plaintiffs suspect that no amount of evidence or proof of prison practices would have satisfied defendants or overcome their gospel of the infallibility of prison administrators. The District Court, however, has the responsibility of weighing the evidence. It did not believe defendants.[5]

The credibility of Missouri prison officials has been frequently challenged in the lower courts, which have detected a certain scorn for inmates' First Amendment rights. *See, e.g., Hill v. Blackwell,* 774 F.2d 338, 348 (8th Cir. 1985) (Arnold J., dissenting):

> The only witness testifying for defendants below was the defendant Donald Wyrick, Warden of the Missouri State Penitentiary. Several portions of Warden Wyrick's testimony appear to be flippant, or, at least, insufficiently aware of the seriousness of claims of First Amendment rights. . . . . The Warden's attitude is based upon a clear misapprehension of the facts, the kind of misapprehension that would completely justify labeling his response as "exaggerated."

Defendants' argument that the District Court's findings of fact were clearly erroneous seems itself based upon a misunderstanding of that phase. Defendants ignore most of the evidence supporting the findings and merely argue about the significance of some of the Court's findings.

Defendants' contention that the findings of fact were tainted by an erroneous conception of the law, Petitioners' Brief at 42, is similarly flawed. The findings are not of the type that are based upon the particular standard of review applied. Plaintiffs believe that the findings of fact

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[5]Apparently, Texas prison officials are not very credible either. *See* Texas Amicus Brief at 2-3.

fully justify the relief granted below, regardless of the standard of review used.

As an example of defendants' misconceptions, their argument concerning Finding No. 11, Petitioners' Brief at 47-48, ignores evidence that "inmate-to-inmate legal mail routinely is opened, stopped, and refused in violation of the Department of Corrections' written rule." *See* Vol. III at 255; Vol. IV at 164-65, 215-16; Vol. V at 65-66. Defendants cite regulation § 20-118.010(2)(B) and argue that "mail sent between inmates does not fall under any category of legal mail, thus, it does not merit automatic privilege." Petitioners' Brief at 48.

Defendants do not seem very familiar with their own rules, however, because their regulation § 20-118.010(1)(E) specifically provides that "[c]orrespondence between inmates in all divisional institutions *will be permitted* concerning legal matters." J.A. at 34 (emphasis added). Arguing about the application of that rule, however, does not make the finding clearly erroneous.

Similarly, in a challenge to the Court's findings concerning correspondence, defendants—without citations—claim that the Court "completely ignored the unrefuted evidence by the appellants' witnesses." Petitioners' Brief at 49. Simply put, the District Court was not required to accept defendants' speculative testimony as a complete answer to the sincere complaints raised by plaintiffs.

The trial court's evaluation of defendants' credibility was undoubtedly influenced by the evidence plaintiffs presented concerning corrections officials' usual attitude toward inmates' rights. As noted above, defendants repeatedly violated their own rules and inmates were harassed because of their participation in this suit.

In addition, the District Court found the grievance process inadequate. Finding No. 34, 586 F. Supp. at 593. The evidence showed the grievance process to be a rubber stamp, Vol. IV at 6-7, 59-60, and that grievances concerning marriage or free speech were treated in the same manner as a gripe about bad food. *Id.* at 49-50.

On the whole, the record reveals a pattern and practice of deep hostility towards inmates' attempts to exercise their marriage and correspondence rights. Superintendent Turner admitted he told at least one inmate that she would have to take him to Court if she wanted to get married. Vol. I at 175. He further betrayed his attitude toward inmates' constitutional rights when he told Ms. Watson that plaintiffs "could get all the court orders we wanted, that he didn't have to honor them." Vol. IV at 203.

The District Court's findings, affirmed by the Court of Appeals, are fully supported by the record and are not clearly erroneous.

II. THE REGULATIONS AND PRACTICES OF THE MISSOURI DEPARTMENT OF CORRECTIONS UNCONSTITUTIONALLY INFRINGE UPON THE FIRST AMENDMENT RIGHTS OF INMATES TO CORRESPOND

The First Amendment issue in this case is whether the practice of routinely prohibiting innocent correspondence between inmates violates plaintiffs' free speech rights. Put another way, the issue is whether corrections officers may ban all innocent inmate-to-inmate correspondence because a small percentage of prisoners may try to abuse their correspondence rights.

This Court has always "insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson v. Palmer,* 468 U.S. 517, 523 (1984). *See also Jones v. North Carolina Prisoner's Labor Union, Inc.,* 433 U.S. 119, 125 (1977); *Pell v. Procunier,* 417 U.S. 817, 822 (1974). Furthermore, this Court instructs the lower courts to seek a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Bell v. Wolfish,* 441 U.S. 520, 546 (1979), *quoting Wolff v. McDonnell,* 418 U.S. 539, 556 (1974).

Defendants allow certain inmate correspondence, apparently recognizing that such communication is not "fundamentally inconsistent with imprisonment." For their part, plaintiffs have always been prepared to accommodate the State's legitimate interests by accepting prison employees' ability to read all non-privileged inmate mail. Defendants, however, refused to compromise by acknowledging any limit to their power to ban all inmate-to-inmate correspondence if they so desire.

The courts below harmonized this Court's teachings and reconciled the tension between constitutional rights and prison practicalities. In response, petitioners and their amici implicitly urge this Court to ignore the factual findings of the District Court and adopt a standard of review so deferential to prison bureaucrats that it would effectively abdicate the traditional judicial function of protecting individual rights.

Defendants inflate a healthy respect for corrections expertise into an irrebuttable presumption in favor of the prison practice. Despite the extensive evidence in this case that the officials' alleged concerns were overstated,

speculative, and unpersuasive, defendants ask this Court to rule as a matter of constitutional law that their trial testimony on direct examination had to be accepted as absolute truth by the District Court.

This conclusion would dictate that in any area where prison administrators can voice an arguably logical rationale for limiting or denying an inmate's fundamental constitutional rights, the courts must approve the restriction. Petitioners' Brief at 18, 20-21, 32; Solicitor General's Brief at 13. Under the method of analysis urged by defendants, a prison official who sincerely concludes that the Christian faith and belief in absolution and the guarantee of redemption interferes with inmates' rehabilitation (or, to use defendants' term, is not in their "best interest"), could forbid his charges from practicing their religion without violating the First Amendment. As defendants put it, "[i]f the superintendent perceives certain activity which detrimentally affects the rehabilitation of an inmate, he should be permitted to prohibit or limit such activity." Petitioners' Brief at 32.

This Court has never taken such an uncompromising position. In *Martinez,* the Court recognized the First Amendment "interest of prisoners and their correspondents in uncensored communications by letter," 416 U.S. at 418, and established "the proper standard for deciding whether a particular regulation or practice relating to inmate correspondence constitutes an impermissible restraint of First Amendment liberties." *Id.* at 413. It held that any restriction or censorship of inmate mail is justified only if the prison authorities meet two criteria:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nonetheless be invalid if its sweep is unnecessarily broad.

Id. at 413-14.

Although paying proper deference to correctional officials' expertise, the District Court nevertheless held that the regulations and practices of the Missouri Department of Corrections regarding inmate-to-inmate correspondence were "unnecessarily sweeping" and that prison officials "can effectively cope with [the alleged security concerns] through less restrictive means, such as increased scanning of the mail of potentially troublesome inmates." 586 F. Supp. at 596.

In addition, the trial court held that the Division of Corrections mail regulations and practices were applied in an arbitrary and capricious manner and "fail[ed] to provide for the minimum constitutional procedural safeguards against arbitrary and capricious censorship." *Id.* Significantly, defendants did not appeal from this latter holding. By itself, this ruling justifies the relief granted below. *See Bell,* 441 U.S. at 539.[6]

The Court of Appeals reviewed both the factual findings and the legal analysis of the trial court and affirmed

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[6]Moreover, the "best interests" standard is unconstitutionally vague because persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1925).

based on the conclusion "that the exchange of inmate-to-inmate mail is not presumptively dangerous nor inherently inconsistent with legitimate [penological] objectives." 777 F.2d at 1313. The Court followed the analysis of Judge Kaufman in *Abdul Wali*, 754 F.2d at 1033:

> Our reading of the cases suggests a tripartite standard, drawn by reference to the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right. . . . .
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> . . . .
>
> Where . . . the activity in which prisoners seek to engage is not presumptively dangerous, and where official action (or inaction) works to deprive rather than merely limit the means of exercising a protected right, professional judgment must occasionally yield to constitutional mandate. In these limited circumstances, it is incumbent on prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved.

Defendants attack the lower courts' analysis of the inmate-to-inmate mail regulation, contending that their power over correspondence is unfettered by traditional First Amendment analysis even where inmate correspondence is "pure speech," untainted by any threat to the security or order of the institution. Defendants' sweeping vision of their power is not justified by the cases they cite.

The proper lesson of cases like *Pell, Bell,* and *Jones* is that in areas arguably peripheral to central First Amendment concerns—such as face-to-face media interviews with inmates, receiving hardcover books, or mass mailings to solicit membership in an illegal prisoner's union—prison authorities' reasonable rules should be upheld so long as the officials do not exaggerate their response to their legitimate concerns. This relevantly lenient standard does not and should not apply where pure, innocent speech between inmates is forbidden by the challenged practice, particularly where the prison officials have demonstrated a history of abuse of inmates' rights.

Except for *Martinez,* none of this Court's prior prisoner cases has dealt with core First Amendment rights or pure free speech. *Shabazz v. O'Lone,* 782 F.2d 416, 420 (3d Cir. 1986) (en banc), *petition for cert. filed,* 54 U.S.L.W. 3730 (U.S. Apr. 6, 1986) (No. 85-1722).[7] None overruled the *Martinez* standard; indeed, *Jones* and *Bell* explicitly rely on *Martinez* for authority and support. *Jones,* 433 U.S. at 119, 130, 133; *Bell,* 441 U.S. at 547. Moreover, in each of those cases, the Court recognized and found that inmates' First Amendment rights were protected by alternative channels of communication.

In grappling with the tension between inmates' rights and prison practicalities, the lower courts have fashioned a

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[7]Defendants applaud the standard of review once used by the Court of Appeals for the Third Circuit, which limited the judicial inquiry to determining whether prison officials' opinions were sincerely held and arguably correct. *St. Claire v. Cuyler,* 634 F.2d 109, 114 (3rd Cir. 1980). *See* Petitioners' Brief at 21. However, the Court of Appeals for the Third Circuit, sitting en banc, has overruled *St. Claire* because the earlier panel formulation provides insufficient protection for inmates' rights. *Shabazz,* 782 F.2d at 419-20.

workable standard based on accommodation of the conflicting interests. Core rights such as pure speech, fundamental religious practices, and marriage deserve the least restrictive alternative analysis; arguably peripheral "rights" receive review which is more deferential to the concerns of prison officials. *See Shabazz,* 782 F.2d at 420; *Abdul Wali,* 754 F.2d at 1033; *Bradbury,* 718 F.2d at 1543; *Storseth v. Spellman,* 654 F.2d 1349, 1355-56 (9th Cir. 1981). *See also Wiggins v. Sargent,* 753 F.2d 663 (8th Cir. 1985); *Stevens v. Ralston,* 674 F.2d 759, 761 (8th Cir. 1982) (per curiam); *Watts v. Brewer,* 588 F.2d 646, 650 (8th Cir. 1978); *Guajardo v. Estelle,* 580 F.2d 748, 753-57 (5th Cir. 1978); *Rudolph v. Locke,* 594 F.2d 1076, 1077 (5th Cir. 1979) (per curriam); ABA Standards For Criminal Justice Standard 23-6.1(a) and commentary (2d ed. 1983). This Court should adopt the approach used by these thoughtful judges rather than the extreme position advocated by defendants.

Defendants label the analysis of the Second and Eighth Circuits as "fundamentally flawed because it cannot be applied without an appeals court deciding what is 'inherently dangerous.'" Petitioners' Brief at 25. They parade imaginary horribles, suggesting that adoption of the lower courts' method of analysis would "make the writing of prison regulations impossible." *Id.*[8]

[8]Defendants' suggestion that corrections officers and their counsel will be unable to apply the *Abdul Wali* analysis, Petitioners' Brief at 25, is fundamentally inconsistent with their claims to omniscience when it comes to determining the "best interests" of their charges. Surely, the mental acuity used to predict the success of prisoners' proposed marriages could be turned to reaching a fair balance between inmates' rights and prison needs. Plaintiffs believe that prison officials and their counsel can recognize fundamental rights and apply the least restrictive alternative analysis.

The absurdity of defendants' position is revealed by their declaration that "[i]nmate-to-inmate communication is an 'inherently dangerous' activity *just as this Court found inmate association to be in Jones. . . .*" *Id.* at 26 (emphasis added). Apparently courts are capable of identifying "inherently dangerous" activities when they agree with prison administrators; only when a court disagrees with corrections officials does it lose its knack for making such fine determinations.

It is clear that inmate-to-inmate communication is not an "inherently dangerous" activity, for defendants claim they approve all familial mail and 25% of all non-familial correspondence. The only possibility which inheres in inmate communication is that it potentially may —but not necessarily will—be abused by a small percentage of prisoners. In this regard, inmate-to-inmate mail is no more "inherently dangerous" than inmate correspondence with civilians.

Defendants' attempt to characterize their correspondence rule as a mere "time, place or manner" restriction, Petitioners' Brief at 28-29, is disingenuous. Len Safley, for example, had no alternative time, place, or manner of fulfilling his desire to communicate with his fianée. *Cf. Vester v. Rogers,* 795 F.2d 1179, 1183 n.5 (4th Cir. 1986) (upholding ban on inmate-to-inmate correspondence on ground that "communication would be possible through non-prisoner intermediaries such as family, friends, clergy, etc.").

In the Missouri prison system, any attempt to communicate through civilians or other inmates would be circumvention of the mail rules which would subject the in-

mate to discipline and the civilian to a return of his correspondence. *See, e.g.,* Vol. I at 145. When Mr. Safley's mother wrote to P. J. Watson telling her that Len "sends you love and hopes that you are okay, he thinks of you continually, so hang in there," this letter was refused by Renz as containing "contraband." Vol. V at 93-94; P. Ex. 71, Vol. IV at 185; *see also* P. Ex. 19, Vol. III at 199-200.[9]

On the facts of this case, defendants did not and cannot establish that innocent correspondence between two inmates is "fundamentally inconsistent with imprisonment." Defendants' expert conceded that 25% of non-familial inmate-to-inmate correspondence is "positive." Vol. V at 22. Additionally, defendants claimed they permitted the exchange of letters between "unapproved" correspondents when; on a leter-by-letter basis, it was determined to be "positive." Vol. V at 53-54.

Numerous witnesses testified that they wished to correspond with various unrelated inmates at other correctional facilities for the purpose of maintaining their friendships and relationships. Vol. I at 128, 146-47, 204-05; Vol. III at 41-43, 51-52, 87-90, 103, 115, 190-92, 225. Renz inmates who were prohibited from writing their friends. however, had no legal "alternative channel of communication."[10] Those inmates who wished to maintain relation-

[9]Iowa's Amicus Brief mistakenly suggests that Missouri's "prison policy would also allow the sending of letters by each of these inmates to nonincarcerated relatives who then could have exchanged news about each of the inmates." Iowa's Amicus Brief at 6-7.

[10]Many Renz inmates felt the need to communicate so strongly that they risked punishment by circumventing the mail rule. Vol. I at 154-55; Vol. IV at 177-78, 182. Of course, when the inmate successfully circumvents the mail, no state interest is served because there is no surveillance of the communication.

ships and friendships with non-related inmates at other institutions or to discuss politics, religion, or only mutual affection were forbidden to do so.

Plaintiffs invite the Court's attention to the examples of inmate correspondence that were stopped by defendants. Apps. A through D. The Court will find romantic, sometimes gushy, sentimentality. Yet, there was no rational, much less substantial, reason for defendants to have censored them.

Defendants' "security" rationalization for the Renz correspondence practices seems to have been developed to buttress defendants' position at trial. The testimony showed that the reason stated for denying correspondence —on those few occasions when the inmate received an explanation—was that correspondence was simply not allowed or that it was not in the inmate's "best interest." Defendants' interjection of irrelevant evidence regarding instances of gang infiltration and violence at MSP in a desperate attempt to bolster their position indicates how tenuous and speculative the "security" rationale was.[11]

Furthermore, defendants' claims that permitting innocent inmate-to-inmate correspondence would cause overwhelming security and financial problems[12] are also specu-

[11]Defendants also cite Sally Halford's opinion that Kansas' open correspondence policy contributed to an escape. The District Court's questioning revealed, however, that this was only speculation. Vol. III at 158-59. For similar speculation, see Vol. III at 271.

[12]*Cf. Rhodes v. Chapman,* 452 U.S. 337, 359 (1981) (Brennan, J., concurring) (constitutional requirements are not limited by dollar considerations).

lative and exaggerated. The revised rule drafted by the Department of Corrections adequately protects prison officials' ability to censor or stop inmate-to-inmate mail that threatens institutional security or safety.

The new rule satisfactorily strikes a balance between the inmates' First Amendment rights and the State's legitimate interests. Reading inmate mail may be "very boring," Vol. III at 176, but it is far better to bore mail room personnel for a short period of time each day than to strip all inmates of their constitutional right to innocent correspondence. Indeed, now that the Missouri Department of Corrections has identified the 6.7% of all inmates who cause 90% of the problems, *see* Solicitor General's Brief at 20 n.13, defendants can focus their attention on the mail of those most troublesome inmates.[13]

On this record, defendants' apocalyptic predictions that "inmates will have their rehabilitation retarded," Petitioners' Brief at 24, and that they would be unable to cope with their security concerns by reading prison mail, Petitioners' Brief at 22, can be recognized as the exaggerated protestations of officials unaccustomed to acknowledging any measure of inmates' rights. If the revised rules started wreaking so much havoc on their effective date in June, 1984, why have the defendants failed to ask the District Court for any revision of the Court's order?

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[13]Similarly, Texas prison officials were unable to convince Judge Singleton that the correspondence of all 38,000 Texas inmates should be stopped because of 1230 alleged gang members. Lodging of the State of Texas at 122-34; Texas' Amicus Brief at 2-3.

If this Court concludes that the lower courts were mistaken in the method of analysis used, this case must be remanded for supplemental findings of fact and conclusions of law. Issues on which supplemental findings would be necessary include whether prison officials' beliefs were reasonable and sincere and whether they exaggerated their response to their legitimate concerns. *See, e.g., Jones,* 433 U.S. at 127.[14]

III. THE REGULATIONS AND PRACTICES OF THE MISSOURI DEPARTMENT OF CORRECTIONS UNCONSTITUTIONALLY INFRINGE UPON THE RIGHTS OF INMATES TO MARRY

The Court of Appeals affirmed the District Court's application of the "strict scrutiny" standard in evaluating the Department of Corrections' inmate marriage rule, relying on *Zablocki, Bradbury,* and *Abdul Wali.* 777 F.2d at 1314. The Court of Appeals noted that the District Court "assumed that the marriage rules were intended to serve the legitimate state interests in security and rehabilitation," *id.* at 1313, and agreed with the District Court that the rule "unconstitutionally infringes upon plaintiffs' right to marriage because it is far more restrictive than is either reasonable or essential for the protection of any state security interest, or any other legitimate interest, such as rehabilitation of inmates." 586 F. Supp. at 594; 777 F.2d at 1314. This holding was amply justified by the evidence in this case.

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[14]Remand for similar factual findings would also be necessary if the Court disagrees with the lower courts' analysis of the marriage issue.

Defendants concede that marriage is a fundamental right protected by the United States Constitution. Petitioners' Brief at 30. *See Zablocki,* 434 U.S. at 383; *Loving v. Virginia,* 388 U.S. 1, 12 (1967). This Court has recognized the importance of an individual's freedom of personal choice on marriage decisions. *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 426 (1983).

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

Because freedom of personal choice in marriage is central among due process liberties, virtually all of the courts which have considered the issue since *Zablocki* have ruled that a prison regulation interfering with the exercise of the fundamental right of marriage must further a substantial governmental interest and must be no more restrictive than necessary to protect that interest. *Bradbury,* 718 F.2d at 1543; *Lockert v. Faulkner,* 574 F. Supp. 606 (N.D. Ind. 1983); *Salisbury v. List,* 501 F. Supp. 105, 109 (D. Nev. 1980); *In Re Victor Carrafa,* 77 Cal. App. 3d 788, 143 Cal. Rptr. 848 (1978) (based both on fundamental nature of marriage right and state statute recognizing marriage as fundamental). *See also* ABA Standards For Criminal Justice Standard 23-8.6(a)(i). *But see Wool v. Hogan,* 505 F. Supp. 928 (D. Vt. 1981).

The only restrictions placed on marriage by the Missouri legislature are that both parties must be single and over 18 years of age (or have parental consent), that they must have a marriage license, and that the marriage must be solemnized by an appropriate person. *See generally* Mo. Rev. Stat. §§ 451.020 to 451.120 (1978 and 1984 Supp.). Thus, under Missouri law, the various plaintiffs were entitled to be married.

As discussed above, an inmate loses only those rights that must be sacrificed in order to serve legitimate penological needs. *Bell,* 441 U.S. at 545-46; *Jones,* 433 U.S. at 125; *Bradbury,* 718 F.2d at 1541. "When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect the constitutional rights." *Martinez,* 416 U.S. at 405-06.

The plaintiffs and the lower courts acknowledged the prison administrators' concerns. The District Court noted, however:

> The problem with placing total reliance on the views of prison administrators would be their natural inclination to form opinions based on convenience, conceivable though remote security interests, financial considerations and the like. While giving due deference to such testimony, the court has an inescapable duty of striking a constitutional balance.

586 F. Supp. at 594 n.2. The trial court concluded from the evidence that the Missouri Department of Corrections regulation regarding inmate marriages was not the least

restrictive alternative to achieve Missouri's legitimate governmental interests. 586 F. Supp. at 594. The Court of Appeals agreed and also observed that "[n]o specific incident of the realization of any of these [rehabilitation or security] concerns, involving these or any other inmates, was alleged or shown." 777 F.2d at 1315.

Defendants do not confront or meet the lower courts' holdings directly by claiming that their power to prevent inmate marriages is the least restrictive alternative available to advance the State's legitimate interests. Instead, they choose an assault on the courts' method of analysis and, once again, advocate that absolute deference should be given to prison administrators dealing in an area in which they arguably have expertise. *See* Petitioners' Brief at 32, quoted at page 30, *supra*.

Predictably, defendants read cases like *Jones, Bell, Block v. Rutherford,* 468 U.S. 576 (1984), and *Otey v. Best,* 680 F.2d 1231 (8th Cir. 1982), so broadly that they would admit of virtually no limit on the power of prison officials. Defendants argue "[t]here is little reason to apply the 'least restrictive alternative test' after the advent of [*Jones*]; [*Bell*]; [*Block*]; [*Otey*]." Petitioners' Brief at 31 (citations omitted).

Upon studying those cases, however, a principle emerges by which prisons may regulate the *manner* of exercise of various constitutional rights, but the prison authorities may not *prevent* the exercise of recognized fundamental rights such as marriage, pure speech, and the practice of central religious tenets without subjecting themselves to more stringent methods of constitutional scrutiny. *Shabazz,* 782 F.2d at 420; *Abdul Wali,* 754 F.2d at 1033; *Bradbury,* 718 F.2d at 1542.

In this case, defendants deprived the essence of marriage by preventing most inmates from marrying the spouse of his or her choice. As the Court of Appeals noted, "both the old marriage rule as it was applied by Superintendent Turner and the 1983 rule on its face absolutely prevent those inmates denied permission from getting married. There are no alternative means of exercising that right." 777 F.2d at 1314.

Even if this Court were to reject the reasoning of the Court of Appeals and the District Court, the holdings should still be affirmed because of the substantial evidence and the implicit holding that defendants have exaggerated their response to the needs of security, order, and rehabilitation in Missouri institutions. After evaluating the evidence, the District Court ultimately rejected defendants' assertion that the only way to maintain these governmental interests was to prevent certain inmates from being married.

Moreover, the Department of Corrections' penultimate marriage rule, which purported to require inmates to establish a "compelling" reason for their proposed marriage, is not even rationally related to the State's legitimate concerns. The word "compelling" was not defined; defendants Turner, Blackwell, and Wyrick each created their own formulation at trial. *See* Vol. I at 215-17; Vol. IV at 30, 237, 249.[15] The lowest common denominator of these definitions seems to be that a marriage *might* be allowed if the inmates had lived together prior to the time they were incarcerated and "the girl was pregnant . . . and the girl

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[15]These differences in the definition of "compelling" establish that the Department's marriage rule is unconstitutionally vague. *See generally Connally,* 269 U.S. at 391.

wanted to marry the fellow so the baby would have a name. . . . " Vol. IV at 237.

There is no rational relation between a rule which allows only inmates with preexisting relationships and pregnancies to be married and security, order, or rehabilitation of the inmates.[16] Why would the marriage of two inmates who met in prison create a greater security risk than the marriage of two inmates who lived together before they were incarcerated? Why would the marriage of two inmates who have never had sexual intercourse or a child necessarily detract from each others' rehabilitation more than the marriage of two inmates expecting an illegitimate baby? Why would "love triangles" be more likely to occur after a marriage ceremony than before?

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[16]At page 31 of Petitioners' Brief they attempt to rationalize the "compelling interest" rule. Unfortunately, some of the statements attributed to defendants do not appear on the pages cited. Plaintiffs have avoided challenging all of defendants' citations and discussion of the evidence, but the errors in Petitioners' Brief at 33-34 demand a response:

Mrs. Roberts in no way withdrew her testimony that Mr. Turner had threatened her with the loss of her children. Vol. III at 61. Moreover, while she was appreciative of Mr. Turner's concern, *she* decided not to marry the "gigolo" when she first met him—she did not need Turner's paternalistic advice to recognize an unworthy suitor. *Id.* at 74-75.

Secondly, the filing of this lawsuit did not precipitate Ms. Watson's "change of heart" with regard to Mr. Safley. Ms. Watson testified that she requested permission to write Mr. Safley two or three weeks after he left Renz in June of 1981, Vol. IV at 201—more than three months before the suit was filed. Turner admitted he knew she wanted to marry Mr. Safley in December, 1981. Vol. II at 51.

Thirdly, Judy Henderson denied that she requested protective custody and testified that any enemies she might have had were in Springfield and that her fiance' David Means was certainly not her enemy. Vol. III at 203, 220, 224.

The inmates had legitimate reasons for desiring marriage. For example, Nancy Row described why she wanted to marry:

> Because I felt like at that time, and I still feel, like it would be a good emotional security to have somebody that I knew out there that cared about me as a person that I could relate to, to know what I was going through in here. He had been in the same situation. He knew the circumstances I was here under and was still yet willing to make that marriage. I felt like it was just an emotional bond as well as an emotional security for me.

Vol. III at 39-40.[17]

Plaintiff's expert, Louise Bouschard, the Executive Director of the Women's Self-Help Center in St. Louis and a counselor for female prisoners at Renz, testified concerning the essentials of helping women offenders regain self-worth and confidence. Vol. IV at 132, 148-49. She noted that these inmates "need to have the right to some control over their lives," *id.* at 153, including the decisions concerning correspondents and fiancés. *Id.* at 149.

The evidence revealed that the few inmates who were married despite Superintendent Turner's objections enjoy a lasting and happy marriage. Vol. I at 208; Vol. III at 76, 80. After the courtroom marriage of Ms. Watson and Mr. Safely, both a Renz guard and Ms. Watson's caseworker were pleased to report an improvement in her attitude. Vol. IV at 208, 256.

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[17]Defendants' assertion that inmates testified that marriage between inmates is "very seldom a good idea," Petitioners' Brief at 39, actually cites to the testimony of one of defendants' witnesses—*not* an inmate. Vol. III at 156.

The Safleys never met before they were both incarcerated at Renz and they still have no children. Neither fact makes their love any less sincere or their union any less sacred.

Prison guards-turned-superintendents should not be allowed to exercise a power over other adults for which they have no training and no expertise. Under either the strict scrutiny standard or the reasoning advanced by defendants, the Missouri Department of Corrections' inmate marriage rule unconstitutionally infringes upon the inmates' fundamental right of marriage.

CONCLUSION

For the reasons stated, the Court of Appeal's decision should be affirmed.

Respectfully submitted,

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APPENDIX A

[P. Ex. 16]

8-18-83
Thurs.

Dear Mike,

Hi little brother. How are things going? Me, I'm doing okay just trying to get something done on this case. It does take time & patience galore.

It was so good to see you & dad. I sure miss & love you guys.

How is Sherry & the boys? Mike, let things work out the say they should. Don't get anxious. Sometimes being apart from one another makes a person realize just how much you do love them.

I know since Dave has been gone I've realized how very much I really do love him. I can't wait until we're married. It won't be long now!

Tell mother I'll call her Thurs. night at church. I need to talk to her. A week from today at 8:30 p.m.

It has really been hot here.

I'm glad I at least have a fan. Even if it blows hot air! *ha ha!* I'm use to all the hot air from all these inmates! *ha!*

Don't forget to send me a money order please. We order our books by the 23rd or 25th so you'll have to hurry up.

I'm still trying to hire Hale Brown. I hope & pray that somehow the Lord will provide a way. I'll tell ya the

Lord has been good to me & helped me everyday to deal with this time.

Little Chip will soon have a birthday Sept. 6th. That's what is going to be hard. I miss him & Angel so much. I've got alot of making up to do when I get home with them. I'm just glad we are close & they can communicate with me about anything. I always want us to be open.

I wrote Larry the other day. He was suppose to be down here but didn't make it.

How do you like your new duplex? It really sounds nice. I can't place where Cairo is in Spfld.

Well little brother I'll close. Write me soon!

Love

Judy

APPENDIX B

[P. Ex. 72]*

[P. 1]

A SPECIAL
BIRTHDAY WISH
FOR YOU

My wish for you
is for no less
Than love and joy
and happiness,
A tranquil heart —
good friends and true
And dear ones
ever close to you.

[P. 2]

Dear Jeannie
Can't seem
to put my thoughts in words
But surely you must know
A heart can feel
so many things
That words can never show
And with your understanding way
You'll know this wish for you
Brings lots of love and gratitude
For thoughtful things you do

HAPPY BIRTHDAY

[P. 3]

We Love You
Very Much
Mama Nez & Len

* Italics represent handwriting.

APPENDIX C

[P. Ex. 102]

WANTED

[Drawing of Woman's Profile]

SUSAN CHRISTENSEN

SUBJECT DESCRIPTION: Soft brown eyes. Sweet luscious lips. A beautiful smile. Heavenly dangerous hip's.

WANTED FOR: Depravations of affection! Lack of lustfull passionate correspondence. Polyandry.

IF LOCATED CONTACT POSTMASTER GENERAL OF THE UNITED STATES OF BEAUTIFUL PEOPLE IN THE DISTRICT OF LOVE LAND . . . . . Subject to be shiped to a cooler climate. Package carefully. Handle with care.

UNITED STATES OF BEAUTIFUL PEOPLE
DISTRICT COURT OF THE CITY OF
••••••LOVE LAND••••••

"INDICTMENT"

EIGHT COUNTS:

RETURNED BY THE GRAND JURY FOR .....

SWEET HEART COUNTY .....

Against

Defendant Susan K. Christensen

Count (1) Aggravated Assault, by love blows "First Degree"

Count (2) Negligence, to plaintiffs Heart "First Degree"

Count (3) Willfully with-holding Senuous Love "First Degree"

Count (4) Aiding & Abetting with other men "First Degree" Seccond Degree Third Degree Fourth Degree Every Degree I can think of

Count (5) Unloving thoughts, "First Degree"

Count (6) Enslaveing Kisses "First Degree"

Count (7) Deadly & Dangerous Weapon, Body, "First Degree"

Count (8) Kidnapped plaintiffs, Heart, Mind & Soul "First Degree"

IN THE SUPERIOR COURT OF
JUDGE G. HEARTACHE SR.

The Jury has duly found you guilty of said Charges, and that you be remanded to the custody of Sweet Heart, County.

UNITED STATES OF BEAUTIFUL PEOPLE
FOR THE
CITY OF LOVE LAND*

"AFFIDAVITE OF CLAIM"

Civil Action February 14th

If anyone here or not present has just cause, why this man and women, should not be joined in someway let him speak now or for ever hold his peace. . . . . .

"NOTIFICATION OF INDICTMENT"

This is to notify all parties therein that the said, Bride, One *Susan K. Christensen* Has an outstanding warrant pending against her, and is wanted on an Eight Count Indictment filed with the City Clerk in the State of Beautiful People, County of Sweet Hear, City of Loveland.

Attorney "Left Abused Heartache Jr., has the Power of Attorney" for Plaintiff and untill said Bride comes forth to answer charges, said Marriage would be . . . . .

NULL

LEFT ABUSED HEARTACHE
ATTORNEY AT LAW
13 ROCK-A-BED-DR. — *H.M. SOGOOD*
OFFICE ADDRESS — WITNESS

DAIL (L) FOR LOVE — *E.C. SUGARPOP*
Phone-Luv Jester — WITNESS

AFFIDAVITS OF FACTS

I *Chris Christensen*
Residing at M.E.C.C. Lonely Heart Dr. Do hereby retain Left Abused Heartache Jr. as my Attorney at Law.

It has duly been submitted to this Court of Law in the State Of Beautiful People, Sweet Heart County, City Of Love Land, Presiding Judge "G. Heartache Sr. An Indictment of Greivous Crimes Against Plaintiffs ol lady by defendant Susan K. Christensen.

Mr. L.A. Heartache Jr., as Attorney for the plaintiff you may proceed with the affidavite sworn to by your client Chris Christensen. May it please the Court we shall prove that the defendant, one, Susan K. Christensen is guilty beyound a shadow of a doubt in that she did commit each and every count of said indictment.

Crimes which are so hidous that all of Sweet Heart County's heart goes out to Plaintiff. The very nature of these gasly crimes righ of malice, forethought and premeditated heart break.

In count (one) of this indictment the defendant perpetrated the charge of aggravated assult on his person by repeatedly hitting plaintiff with swift Love Blows causeing plaintiff to scream in agoney (Mercy, Mercy, Me) . . . . !

Count (two) Willfully with holding Senuous Love giving him a taste of Honey and suddenly with drawing the Sugar an Spice, plaintiff is now in a state of (Endless Love) . . . . !

Plaintiff also claims that he was a sucker for her love.

Count (three) Negligence to plaintiffs Heart by coming into his life and then leaving him day dreaming. . . !

Count (four) Aiding and Abetting with other men making plaintiff realize that he is drowning in a Sea of Love.

Count (five) Unloving thoughts in that defendant is now thinking of another man and plaintiff is saying I gave the best of my love. . . . !

Count (six) Enslaving Kisses, so sweet and tender that plaintiff never once had a chance. Now defendant wants to kiss and say good by . . . . !

Count (seven) Deadly and dangerous weapons to wit: defendant did woo plaintiff with dangerous moves, caress and the most of all incriminating a sensual touches, causing him to say I love you Just the way you are.

Count (eight) Kiddnapped Plaintiffs heart, Mind, and Soul so that plaintiff can not be blamed for any insane actions he might thus incur on anyone and is now caught up in her love and can't let go.

WHEREFORE IF APPRERHENDED ANYWHERE PLEASE BRING THIS DEFENDANT BEFORE SAID JUDGE "G. HEARTACHE SR. FOR SENTENCING AND PUNISHMENT.

"Chris"
PLAINTIFF

APPENDIX D

[P. Ex. 60]

Tues Nite 8/25/81
4 months 'til Xmas!

Hi Pretty Lady!

How are you this evening? Me? *Better* every day! You wouldn't happen to know why would you? (Smile!) Don't ask me! Just go look in the mirror and smile—You'll be looking at the answer—and—the reason!

It was made official today!—I was told! (Ha) I will start to "school" the 31st.—When I will leave for the Honor Center is not definate yet! I "suspect" the 9th but not sure—Probably won't know for sure 'til latter part of next week—

Oh, Lest I forget and to do a friend a favor—if it is, if you know what I mean—tell Judy R that "her man" is slated to come up here from Fordland next week (Wed) She *tried* to do me a favor just before I went down there. Maybe this will repay her for her efforts OK? Remember? She wanted to talk to you about us—

Don't know if the job as Secretary in Maint is open but you oughta try for it—*If* you'd want it! Pays up to 75.00 did you know that? Just a thought!—Or do you still plan on going to Cosmo? *Your* idea of being a Beautician sounds *great* to me! Just out of curiosity (mine) how long does it take to get your "diploma" (LICENSE) You *can* get a States License when you complete the course—after an exam, I mean!? HUH? Let me know! Will ya?

Jeannie, didn't you tell me once that you liked horses—and going fishin'—Well,—for another test of my

memory, how is this: Johnny, Billy and Katrina and 11, 10 & 8? Am I right? (Smile!) Surprise—or no? I wanted you to know that because—and *this* is a dig—or—"I told ya so"—You once told me I even forget *your* name!—Remember—? I won't repeat what I told you when you said it—but it started with "You are full of —! Ha Ha. Really,—we did have some *good* times together, Didn't we!? Oh. I think that I will be working at the State Fair for about 4 or 5 days starting tomorrow nite. I was disapproved at first but had a "little talk" with the Supt. here today. It started out because I appealed the Teams decision on my 3 days in Seg——and it turned into a discussion about quite a number of things that have occured during the past 2-3 months. I'll tell ya about all of it later. But we'll say this—as a clue—it involved among other things a couple of caseworkers—pretty sure you know one of them—'Enuff Said? More later—Be Patient! Ha. Oh, is that a watch on your arm, in the picture? Those are some pretty foxy "sandals" you have on (SMILE) You're welcome! I won't touch that subject any further. PJ, if I hadn't been "up to my ears" (and you know what I mean—ok?) I wouldn't have acted as I did or said what I did about the things Johnny sent—OK? Forgive me? I just wanted to hurt ya I guess. 'Cause I was hurting!

Say, if you get a chance ask Anderson Bey if the electricians from Church Farm have been coming over there, at times (to work). Will ya? Are the gals and the men still alternating "starving" everybody? Ha! Just curious!

I had a real nice letter from my mother today. She is really happy, for us. Jeannie, she knows about your case—I wrote her a real long letter while I was at Fordland and explained it to her *just* as you told me. I thought it was

best and I know it was *now*. I think she loves ya more than me, just 'cause you wrote and told her you loved me. Boy, talking about "going behind a fellers back"! That's the way with you women, though—always "scheming" on a poor dumb unsuspecting man, letting them chase ya til *you* catch *him!* Ha (Smile!) You know PJ, "all of this"—(need I say more?) has been a hell of a strain on both of us—I am *so* thankful and grateful things are as they are—(now) and I say this without having had a word (directly) from you! You are the best thing that has *ever* happened to me! Don't ever forget or doubt that I love you. Hang in there Baby, *I'll be back!* As Ever, For Ever Len

Lenny

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(10)

No. 85-1384

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, Employees of the Department of Corrections and Human Resources for the State of Missouri, *Petitioners,*

vs.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people, *Respondents.*

DR. LEE ROY BLACK; W. DAVID BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT, Employees of the Department of Corrections and Human Resources for the State of Missouri, *Petitioners,*

vs.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people, *Respondents.*

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Miscellaneous Citations

No. 85-1384

In the Supreme Court of the United States

OCTOBER TERM, 1986

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ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I.

The Appeals Court Incorrectly Applied the Least Restrictive Alternative Test to the Department of Corrections' Regulation of Inmate-to-Inmate Correspondence and Erred in Requiring the Defendants to Present Evidence of a Pattern of Security Concerns.

Petitioner files this Reply Brief to address the points raised by the respondents (hereinafter the "plaintiffs") in their brief and by the brief filed by the amici curiae.

The plaintiffs' arguments, as outlined in their brief, can be distilled to one fundamental proposition. Plaintiffs propose that the lower courts' decisions should be upheld because the issue is one of "pure, innocent speech" as opposed to areas of the First Amendment which are, in the plaintiffs' minds, considered peripheral. (*See*, Brief of Respondents, pp. 33-34.) In fact, plaintiffs propose a graduated scale of "core" rights that would receive higher protection over other arguably less important peripheral rights. (*See*, Brief of Respondents, p. 34.)

Although the defendants are uncomfortable with any proposition which would label constitutional rights such as voting, travel, privacy in everything except the decision to marry, and the First Amendment in all exercises except innocent communication as peripheral, it is believed that the best response to plaintiffs' argument is to point out that it is wrong. This Court has not taken the position that some rights are more equal than other rights. In fact, this Court has expressly noted that there is "no principled basis on which to create a hierarchy of constitutional values". *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 484 (1982). There is no legitimate basis for the plaintiffs' proposal that the test employing the least restrictive alternative analysis should be applied to certain "fundamental" rights and a more deferential test be applied to "peripheral" rights, such an approach would lead to chaos in both the courts and in the prison community as everyone attempted to grapple with a tiered system of review of constitutional rights.

Furthermore, the plaintiffs have made much of the fear that the rational relations test would permit too much deference to the professional judgment of prison administrators.[1] Deference to the professional judgment of prison administrators is a reasonable approach when addressing the intricate and difficult problems of the administration of a prison. It is not, as the plaintiffs complain, a matter of permitting the prison administrators too much discretion, rather, it is a matter of permitting them enough discretion to anticipate problems in their prison. If a prison administrator disregards constitutional rights or takes actions in bad faith or without legitimate basis, he would not be insulated from review. *Whitley v. Albers,* ..... U.S. ....., 106 S.Ct. 1078, 1085 (1986). The standard

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1. Plaintiffs have attacked the defendants' arguments by attacking the defendants personally. In the court below, defendant Turner was alleged to be unqualified to make decisions affecting the lives of inmates because he had once been a guard and did not have a college education. Mr. Wyrick is alleged to have been frequently challenged in the lower courts because of his "scorn" for inmates' First Amendment rights. *Citing*, dissenting opinion, *Hill v. Blackwell,* 774 F.2d 338, 348 (8th Cir. 1985). In spite of the scolding by Judge Arnold, the Eighth Circuit found in favor of the Department of Corrections using an analysis which is remarkably similar to the analysis requested by the defendants in the present case. For the record, Mr. Wyrick has also had his share of compliments for his efforts in the field of corrections. *See, Burks v. Teasdale,* 492 F.Supp. 650, 682 n. 34 (Mo.W.D. 1980).

of review proposed by defendants permits the prison officials the discretion to administer their prisons unless there is substantial evidence that the disputed practice constituted an exaggerated response to the legitimate penological goal or that the beliefs of the prison officials were unreasonable. *See, Pell v. Procunier,* 417 U.S. 817, 827 (1974); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 128 (1977).

The use of the least restrictive alternative test, however, would cause a number of problems. The use of that test would require courts to determine what activities are inherently dangerous, a pursuit which is sometimes more difficult than it seems, and one which would lead to conflicts among the circuits. The choosing of the least restrictive alternative would result in court entanglement in the day-to-day operation of every conceivable activity and facet of prison life. It could lead to plainly bad decisions which would endanger the safety of staff and prisoners.

> Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to intractable problems are better and more workable than those of persons who are actually charged with and trained in the running of a particular institution. . .

Bell v. Wolfish, 441 U.S. 520, 562 (1979). *See also, Illinois Election Board v. Socialist Workers Party,* 440 U.S. 173, 188 (1979) (Blackman J., concurring) ("a judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation. . . .") In fact, when dealing with a prison rule or practice, it is an inappropriate function of the reviewing court to consider a panoply

of alternative measures and to select one it believes the most desirable. Instead, the proper inquiry would seem to be whether the rule or practice in question constitutes a valid exercise of professional judgment. This standard has been held by this Court to apply even in a situation where an individual's constitutional rights are not subject to the restrictions which are incident to lawful incarceration. One such case is *Goldman v. Weinberger,* ..... U.S. ....., 106 S.Ct. 1310 (1986), which could be argued as closely analogous to the present one.[2] In *Goldman,* an Orthodox Jew challenged the military regulation not permitting him to wear a yarmulke. This Court upheld the regulation concluding that it was not the duty of the Court to select between conflicting and equally valid professional opinions as to whether the regulation was necessary to military goals but, rather, only to determine that there had been, in fact, a valid exercise of professional judgment instituting the regulation at issue. *Id.* at 1314. *See also, Youngberg v. Romeo,* 457 U.S. 307, 321 (1982) (similar deference to the judgments of mental health professionals). It would be ironic if the Constitution could be interpreted to permit more restrictions on the exercise of a Marine's First Amendment rights than to a prisoner who has been convicted of a felony and who may demonstrate a "proclivity for anti-social, criminal and violent behavior." *Hudson v. Palmer,* 468 U.S. 517,

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2. This Court has noted a parallel between the exercise of the First Amendment rights in the military and in the penal context. *See, Jones v. North Carolina Prisoners' Union, Inc., supra,* 433 U.S. at 133-134. Successful operation of the military and prisons requires expertise particular to individuals responsible for those functions. *See, Chappell v. Wallace,* 462 U.S. 296, 305 (1983). In each area, when reviewing a particular practice, courts have deferred to the expertise of the respective officials in those areas. *See, Rostker v. Goldberg,* 453 U.S. 57, 66-67 (1981).

526. Such a result is inappropriate because the differences in the two circumstances are obvious. In a prison, there is an "ever present potential for conflict and conflagration." *Whitley v. Albers, supra,* 106 S.Ct. at 1085, citing *Jones v. North Carolina Prisoners' Union, Inc., supra.* On an even more practical level, many of the standards applied pursuant to the least restrictive alternative test cause daily administration problems for the prisons. Under this standard it would be difficult, if not impossible, for corrections officials to anticipate what is required of them. Only after a matter is resolved by litigation would a prison official actually know if a measure is constitutionally acceptable.

This would lead to administrator's concerns that, ultimately, they might be subject to damage awards or at least costly litigation which will stultify the exercise of their best professional judgment and will inhibit the initiative for new programs within the prison. Knowing that their choice among several available security measures may be scrutinized by a federal court in terms of imposing the least restriction on inmates' rights, prison officials are likely to institute regulations less restrictive than those they believe, in their professional judgment, are warranted. Similarly, officials may be reluctant to initiate new or experimental programs which might be beneficial to prisoners if there is a possibility that the relevant rules and regulations might be determined to constitute an improper infringement of inmates' constitutional rights.

This could lead to the most serious consequence all. that prison administrators may implement a measure which, in the judgment of their lawyers, may be the least restrictive alternative, but will result in tragic and irreparable injury. Although the unfettered exercise of the

First Amendment is a goal that should be striven for in a prison forum, as well as a public forum, the protection of the internal security, the protection of the staff, and of other inmates, has to be carefully weighed. The nearly impossible task of reviewing every piece of mail will not solve the problems but will beg for a misstep by an employee, a misstep which will result in tragic error. Some courts have recognized the difficulties in discovering the codes in inmate correspondence and the control of gangs. *See, Gometz v. Henman,* No. 85-3123 (7th Cir., Dec. 8, 1986) p. 4-5 (dicta).[3]

The plaintiffs make much of *Shabazz v. O'Lone,* 782 F.2d 416 (3rd Cir. 1986), *cert. granted* (October 1i, 1986, No. 85-1722) in which the Third Circuit modified its decision in *St. Claire v. Cuyler,* 634 F.2d 109 (3rd Cir. 1980). Since this is a subject of a pending argument and can be best presented by the advocates in that case, the defendants will not dwell at any length on the decision. The rationale, however, employed in *Shabazz* seems to violate the principles previously enunciated by this Court.

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3. The *Guajardo* amicus curiae propose that the record is distorted and incomplete because the inmates did not cross-examine the prison officials. The information provided to this Court by Texas in its filing is not misleading. That the inmates in Texas do use codes and plot murder in their correspondence is eloquently demonstrated. The defendants submit that the reasons behind the settlement of the issue is not known to these defendants and is irrelevant to the case now before this Court.

The *Guajardo* amicus also purports to present evidence that inmate correspondence is not a "significant" factor in the control of prison gangs. A review of cited material indicates that such a statement is not substantiated. The authors surveyed various state prison systems for strategies to combat gangs. The study did find the most accepted curative measure for combatting gangs was isolation. *See,* G. Camp & C. Camp, *Prison Gangs: Their Extent, Nature and Impact on Prisons* (1985) p. xvii. One would think that goal is best achieved by control of communication. The report also found Missouri to be a state in which gang problems have a high profile. *Id.* at 47, 154.

In *Shabazz,* the Court applied a standard which only permitted regulations which further security interests to be upheld. *Shabazz v. O'Lone, supra* 782 F.2d at 420. It seems that the rehabililtation of prisoners, the deterrence of crime, and the isolation of offenders from the rest of society are interests that are no longer applicable in this area. Such a result is contrary to this Court's principles. *Jones v. North Carolina Prisoners' Union, Inc., supra,* 433 U.S. at 129. Finally, the Court in *Shabazz* applies a modified least restrictive alternative test which would invite judges to substitute their judgment for that of the prison officials. *Id.* at 424, 429. Again, such a result is contrary to this Court's instructions. *Block v. Rutherford,* 468 U.S. 572, 589-90 n. 10. A more persuasive argument is made by the Fourth Circuit in *Vester v. Rogers,* 795 F.2d 1179 (4th Cir. 1986). In *Vester,* the Court specifically noted the difference between *Procunier v. Martinez,* 416 U.S. 396 (1974); *Pell v. Procunier, supra,* and the subsequent cases. *Id.* at 1181. Although in *Vester* the prison officials permitted alternative means of communication through civilians, they also noted that a regulation which permitted correspondence between institutions upon approval of the wardens was not a regulation that totally prohibited communication. *Id.* at 1183 n. 5. Even among those inmates who would be prohibited from corresponding with inmates at other institutions, all communication is not stopped since they would still be able to correspond with non-prisoners, and even those inmates who have been released.

In conclusion, the decision of the Eighth Circuit Court of Appeals should be reversed and the injunction dissolved.

II.

The Appeals Court Incorrectly Applied the Least Restrictive Alternative Test to the Missouri Department of Corrections Marriage Rule and Erred in Requiring Defendants to Present Evidence of a Pattern of Security Concerns.

In responding to the defendants' arguments that the lower court used an improper standard of review, the plaintiffs present the argument that prison officials only deserve deference in a few specific areas of expertise in which the plaintiffs would consider them qualified to render an opinion. (*See,* Respondents' Brief at p. 46.) The plaintiffs also assert that the evidence showed that the appellees exaggerated their response to the perceived legitimate penological goals.

Somewhere between the principle that an inmate does not leave his rights at the prison door and the reality of the difficulties of prison administration, this Court is going to have to strike a balance. The plaintiffs strike the balance in favor of the inmates since they are adults and have rights which should only be burdened in the least restrictive manner and only then with the inmates' willing cooperation. The defendants, on the other hand, strike the balance in favor of the prison officials since the inmates' adulthood has not saved them from the voluntary commission of felonies and the unwillingness, in some cases, not to continue a life of crime, violence and abuse while in prison. It is the officials of the prison who have to order, cajole or persuade their charges to rehabilitate. It is the prison officials who have to inform unwilling and sometimes very bad people that what they have done in the past is not what they are going to do in prison. It is the prison officials who run all the risks and have to pro-

vide all the protection. The plaintiffs' arguments are nothing more than an invitation to this Court to apply an incorrect legal principle and close its eyes to the difficulties of prison administration.

It is believed that it is admitted by all concerned that the Renz Correctional Center is still a different prison from most others. *Safley v. Turner*, 586 F.Supp. at 590-591 (W.D. Mo. 1984). The problems with the day-to-day management, the maintenance of internal security, and the rehabilitation of inmates are, at best, extraordinarily complex problems and invariably subject to second-guessing by others. It is easy enough to say that Superintendent Turner was wrong in every single decision he made concerning the rehabilitation of his inmates and the security of his institution.[4] It is also unfair.

The plaintiffs have made much of the fact that the term "compelling interest" was not defined in the regulation. It was, however, defined and understood to mean basically some sort of prior relation between inmates. The plaintiffs' allegation that defendants had different definitions is not exactly accurate. Naturally, there are differences in syntax and explanation, but the witnesses describe fundamentally similar interpretations of the regulations. (Vol. I, Tr. 215-217; Vol. IV, Tr. 24, 30 to 37.) It is inherent to the exercise of discretion in a prison, and in other places, that different administrators place differ-

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4. The plaintiffs have made reference to the marriage of Mr. Safley and Ms. Watson in the courtroom of the District Court. It is very much a relief that Ms. Safley's conduct improved after her marriage, but it is difficult to understand the District Court's statement that there was not any substantial state interest in preventing the marriage since there was no hearing in which the prison officials could testify concerning any state interest. (Vol. V, Tr. 121.); *Safley v. Turner, supra*, 586 at 594 n. 1.

ent emphasis on different factors. It is impossible always to forecast every eventuality in the exercise of discretion, and the bureaucratic definitions often do nothing more than stifle its compassionate exercise. As we have noted repeatedly, the marriage between two inmates in prison is, from the testimony, seldom a good idea. (Vol. III, Tr. 156.)[5] If it was not for a third party, a child or some other special interest and relationship, the prison authorities probably would not approve, wholesale, marriages between inmates, (Vol. III, Tr. 152-155; Vol. IV, Tr. 20-21.) As was noted repeatedly at the trial, in the unreal world of prison society, inmates have a bad effect on each other. (Vol. III, Tr. 153, 156; Vol. IV, Tr. 110.) The plaintiffs in this case put themselves in prison by making some very bad life choices. Most women prisoners make them because of the men with whom they chose to associate. (Vol. III, Tr. 154.) It is ironic that the Court found that it was appropriate to ban visits of former inmates based on the evidence that the ban tends to break up criminal associations, yet will not let officials stop associations through marriage.[6]

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5. We would like to apologize to the plaintiffs and to the Court for the miscitation in the petitioner's brief. We never intended to indicate to this Court that an inmate had indicated that marriage between inmates is very seldom a good idea. It was intended that the testimony should be attributed to the defendants.

6. The plaintiffs charge that the defendants mislead the Court in its citation to the transcript. The defendants stand on their citations and interpretation of the record (*see*, footnote 16, Respondents' Brief, p. 44). Relevant to the issue presented is what Superintendent Turner perceived to be the reasons for the marriages and how that affected legitimate penological interests. He believed he had reasonable cause for the denial of permission. This highlights the precarious legal position of most superintendents. On the one hand, they have the affirmative duty to protect inmates and yet their perceptions of potentially violent confrontations are characterized as an implicitly trivial "lover's quarrel". *Safley v. Turner*, 586 F.Supp. 589 (W.D. Mo. 1983).

The plaintiffs also make the argument that deference is not justified where "prison guards turned superintendent presume to exercise a power over adults for which they have no training and no expertise." (Respondents' Brief at p. 46.) This startling assertion is an absolutely incorrect application of the principles of deference to prison officials. This Court has explicitly indicated the deference that is to be given to prison officials is a matter of expertise and comity. Justice Rehnquist noted in *Bell v. Wolfish*, 441 U.S. 520, 548 (1979):

> We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or by state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of a correctional facility is particularly a province of the Legislature and the Executive branch of our Government, not the Judicial.

Further, and importantly, Superintendent Turner has dealt with female inmates with a maximum security level classification intermingled with men of a minimum level security for the past ten years. (Vol. II, Tr. 68-74.) In that time, as his testimony indicated, he has sought to increase the educational and treatment opportunities for the inmates under his care and custody. (Vol. II, Tr. 59-63.) He is well-respected by his peers and supervisors. Superintendent Turner would qualify as an expert in either the co-correctional field or womens' prison administration, in any court and any jurisdiction in this country. The mere lack of his collegiate degree is no bar for his qualification as an expert in this area. He is entrusted with the responsibility of making decisions which control and affect the health and safety of inmates. Those decisions have to sometimes be made at a moment's notice and always without the benefit of hindsight. The District Court did not question Mr. Turner's sincerity, ability or judgment; it would only have done things differently.

In conclusion, the decision of the Court of Appeals should be reversed.

III.

The Trial Court's Findings of Fact Were Clearly Erroneous in That They Were Insufficient to Support the Order of the Court and Proceeded From an Erroneous Conception of Applicable Law.

Essentially, the plaintiffs argue in their brief that the findings of facts are not clearly erroneous because the defendants' witnesses were not credible. They bolster their argument with a dissenting opinion in an unrelated case. (*See*, Plaintiffs' Brief, p. 26.) The plaintiffs' arguments miss the thrust of the defendants' argument. It is the defendants' position that the District Court relied on an erroneous conception of applicable law and did not have sufficient basis through its findings to impose a system-wide injunction.

The plaintiffs argue that the findings made by the District Court are not the type that are based on a particular standard of review. The defendants are somewhat at a loss in determining how to respond to such an assertion. The defendants will grant that many of the findings are irrelevant to the plaintiffs' causes of action. *E.g.*, *Safley v. Turner, supra*, 586 F.Supp. at 591-593 (findings 9, 10, 11, 19, 28, 29, 30, 31, 32, 33, 34.)

For example, in finding eleven, the plaintiffs argue that the defendants are not familiar with their rules concerning legal mail because of a regulation indicating that inmates *will be* permitted to correspond concerning legal matters. (*See,* Respondents' Brief, p. 27.) In a way, this highlights the difficulties with the plaintiffs' and the District Court's findings. In this instance, we have a finding of a violation of allegedly constitutional proportion which is essentially irrelevant to the plaintiffs' cause of action. The plaintiffs alleged not that we interfered with their legal mail, but that we did not permit correspondence between inmates. One does not necessarily have anything to do with the other. Furthermore, the regulation did not give the inmates any automatic right to correspond with one another because they affixed the legend "legal" and sent it to another inmate. For the plaintiffs and the Court to have interpreted the rule in such a matter is essentially in violation of accepted constitutional principles. *Wolff v. McDonnell*, 418 U.S. 539 (1974), does not require prison officials to treat non-privileged mail as privileged unless it clearly is marked as originating from an attorney, including his return address. The regulation specifically notes that the review would be based on "the return address on the outside of the envelope". *Id.* at 576. (*See*, 20-118.010(2)(b) (J.App. 35). *See also; Jensen v. Klecker*, 648 F.2d 1179, 1182-1183 (8th Cir. 1981). In the present case, the Court, by making this finding, flatly misapplied the law enunciated by this Court in *Wolff v. McDonnell*. There is nothing in *McDonnell* which could possibly give any other interpretation and nothing in any other part of the regulation permitting inmates to correspond concerning legal matters which would change the interpretation of the regulation. The interpretation is even in conflict with the law of the

Eighth Circuit. *Harrod v. Halford*, 773 F.2d 234, 235-236 (8th Cir. 1985). Finally, although the Court found that "legal mail" was opened up, it found no constitutional violation, nor did it order any legal remedy. It is almost as if most of these findings of fact were not relied on for anything except some purpose of scolding the defendants. Whether that is appropriate or not is not at issue. It is, however, clear that they do not support the injunction, and they should be reversed.

Significantly, plaintiffs propose that the "record" reveals a pattern or practice of deep hostility toward the inmates' attempts to exercise their marriage and correspondence rights. (*See,* Respondents' Brief, p. 28.) The plaintiffs no lor.ger seem to put their reliance on the findings of fact made by the District Court in this case. If they had, they would be forced to admit that the Court did not find any pattern and practice of constitutional violation. It found, at best, "instances" and "occasional" violations of constitutional rights. Even occasional breaches of a constitutional right are regrettable, but, standing alone, they indicate a system that may be inefficient, but surely not unconstitutional.

Finally, and most significantly, the Court ordered the defendants to find a less restrictive alternative to its inmate to inmate correspondence and marriage rules. It never enjoined or modified any of the existing regulations concerning correspondence to non-inmates and/or legal mail. No damages or remedial actions were ordered.

CONCLUSION

In conclusion, the District Court was clearly erroneous when it entered the findings in the case at bar, and there is no basis for its findings that the rules were enforced in an arbitrary or capricious manner.

The decision of the Circuit Court should be reversed.

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No. 85-1384

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM R. TURNER, ET AL., PETITIONERS

v.

LEONARD SAFLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a Missouri prison regulation relating to inmate-to-inmate correspondence violates the constitutional rights of prison inmates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Miscellaneous:

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

This case presents the question whether the Missouri Division of Corrections regulation relating to inmate-to-inmate correspondence is constitutional. The United States has a strong interest in this question because the federal prison regulation governing inmate-to-inmate correspondence is substantially similar to the Missouri regulation.[1] This Court's deci-

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[1] The federal regulation, 28 C.F.R. 540.17, provides as follows:

> An inmate may be permitted to correspond with an inmate confined in any other penal or correctional institution, providing the other inmate is either a member of the immediate family, or is a party or a witness in a legal action in which both inmates are involved. The Warden

sion may also bear upon the constitutionality of other prison regulations, including federal prison regulations.

This case also presents the question whether a Missouri regulation relating to inmate marriages is constitutional. There is no comparable federal regulation and, except for page 11, note 7, *infra*, this brief does not discuss the constitutionality of the marriage regulation.

STATEMENT

1. a. This is a class action for injunctive relief and damages brought in the United States District Court for the Western District of Missouri on behalf of respondent inmates of the Renz Correctional Institution in Cedar City, Missouri. Respondents challenged the constitutionality of regulations promulgated by the Missouri Division of Corrections and applicable to all prisons in the State of Missouri relating to inmate-to-inmate correspondence and inmate marriages.[2]

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may approve such correspondence in other exceptional circumstances, with particular regard to the security level of the institution, the nature of the relationship between the two inmates, and whether the inmate has other regular correspondence. The following additional limitations apply:

(a) Such correspondence at institutions of all security levels may always be inspected and read by staff at the sending and receiving institutions (it may not be sealed by the inmate); and

(b) The Wardens of both institutions must approve of the correspondence.

[2] The respondent class also includes persons who "may be confined" at Renz and persons who wish to correspond with, or to marry, Renz inmates (see Pet. 3 n.1). In addition to

Renz is a "complex prison": it houses minimum, medium, and maximum security prisoners, both male and female (Pet. App. A2). Most of the female prisoners at Renz are in the medium and maximum security classifications; most of the male inmates are in the minimum security classification (*ibid.*). Renz is also used to provide protective custody for certain inmates (II Tr. 77-78; IV Tr. 23-24). Renz was originally built as a minimum security prison farm, and it still has a minimum security perimeter without walls or guard towers (Pet. App. A2).

The challenged correspondence regulation relates only to inmate-to-inmate correspondence.[3] It permits such correspondence "with immediate family members who are inmates in other correctional institu-

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the two regulations before the Court, respondents also challenged a Missouri prison regulation barring former inmates from visiting a prison until after they have been out of prison for six months. The district court found that this regulation "appears to be rationally related to a proper rehabilitative interest" and that it did "not impinge on any rights sufficiently to be ruled invalid" (Pet. App. A32). That ruling is not at issue here.

[3] The regulation (Division of Corrections Reg. 20-118.010 (1) (E)) provides as follows (Pet. App. A2):

> Correspondence with immediate family members who are inmates in other correctional institutions will be permitted. Such correspondence may be permitted between non-family members if the classification/treatment team of each inmate deems it in the best interest of the parties involved. Correspondence between inmates in all division institutions will be permitted concerning legal matters.

Pursuant to the district court's order in this case, the regulation was amended to lift restrictions on inmate-to-inmate correspondence, subject to inspection for unauthorized articles and substances, threats to institutional security and safety, and evidence of illegal activity (Appellee's Br. App. H).

tions," and it permits correspondence between inmates "concerning legal matters," but it allows other inmate-to-inmate correspondence only at the discretion of each inmate's classification/treatment team (Pet. App. A2-A3). As a matter of practice, the determination whether to permit particular inmates to correspond has been based on the classification/treatment teams' familiarity with the psychological reports, conduct violations, and progress reports in the files of the inmates rather than on individual review of each piece of mail (*id.* at A3). The district court found that "the rule as practiced [at Renz] is that inmates may not write non-family inmates" (*id.* at A21).

The challenged marriage regulation permits an inmate to marry only with the permission of the superintendent of his prison and permits such approval only "when there are compelling reasons to do so" (Pet. App. A5).[4] As a matter of practice, marriage has been authorized only in cases of pregnancy or birth of an illegitimate child (*ibid.*).[5]

b. At trial, Missouri prison officials testified that the purpose of the inmate-to-inmate correspondence

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[4] This regulation was promulgated while this litigation was pending. Before December 1, 1983, the applicable regulation (Division of Corrections Reg. 20-117.050) did not obligate the Missouri Division of Corrections to assist an inmate who wanted to get married but also did not specifically authorize the superintendent of an institution to prohibit marriage of inmates. The district court found, however, that inmates at Renz were frequently denied permission to marry. Pet. App. A4-A5, A22-A23.

[5] Like the correspondence regulation, the marriage regulation was amended pursuant to the court order that is before this Court for review (Appellee's Br. App. G). The amended regulation permits any inmate to marry.

regulation was to maintain security of the institutions administered by the Missouri Division of Corrections. They testified that control of inmate-to-inmate correspondence is important to prevent communication of plans for escape and instructions to commit violent acts, including murder (II Tr. 76-77; IV Tr. 225-228). Renz Superintendent Turner testified that he believed that the inability of inmates to communicate between institutions averted a riot at Renz when a riot occurred at another prison (II Tr. 74). Witnesses testified that the Missouri Division of Corrections had a growing problem with prison gangs, and that restricting communications among gang members—by sending them to different facilities and by restricting their correspondence—was an important element in combatting this problem (II Tr. 75-77; III Tr. 266-267; IV Tr. 226). The former director of Missouri's Adult [Prison] Institutions stated that the Missouri prison system maintained a computer list of known enemies among prison inmates so that they could be housed separately to avoid violence, but that the purpose of separating two known enemies would be defeated if one of them could write to a third person at the other inmate's prison about his problem with the other inmate (III Tr. 264-265). The then director of the Kansas Correctional Institution at Lansing testified that Kansas has an open inmate-correspondence policy that has caused problems (III Tr. 158). She testified that she believed the policy had assisted an escape because the inmates were able to determine that there was a shortage of guards (*ibid.*).

A Missouri prison official testified that it would be "impossible" to read every piece of inmate-to-inmate correspondence (IV Tr. 42-43). The Lansing director

added that piece-by-piece censorship would be tedious and a poor use of staff time (III Tr. 176).

2. The district court issued its memorandum opinion and order on May 7, 1984 (Pet. App. A19-A33). The court found that although the correspondence regulation permitted inmate-to-inmate correspondence if authorized, the practice at Renz was not to authorize inmate-to-inmate correspondence except between family members and that this practice was reflected in the Renz Inmate Orientation Booklet (*id.* at A21). The court found that this denial occurred "without a determination that the security or order of Renz or the rehabilitation of the inmate would be harmed by allowing the *particular* correspondence to proceed and *without a determination that there is no less restrictive alternative* to resolve any legitimate concerns of the Department of Corrections short of prohibiting all correspondence" (*ibid.* (emphasis added)).[6] Applying the "strict scrutiny" analysis of this Court's decision in *Procunier* v. *Martinez*, 416 U.S. 396, 413-414 (1974), the district court found that "[e]ven if some restrictions on inmate-to-inmate correspondence can be justified, the regulations and practices at bar must fall" because they are "unnecessarily sweeping" (Pet. App. A31). The court said, citing *Procunier* v. *Martinez*, *supra*, that the "regulations and practices fail to provide for the minimum constitutional procedural safeguards against arbitrary and capricious censorship" (Pet. App. A31). Finally, the court "conclude[d] that the institution can effectively cope with the problems through less

[6] The court also found that, in practice, Renz officials had on several occasions stopped inmate correspondence that would appear to be permitted by the regulation (Pet. App. A20-A22).

restrictive means, such as increase[d] scanning of the mail of potentially troublesome inmates" (*ibid.* (citations omitted)). As to the marriage regulation, the district court, relying principally on *Bell* v. *Wolfish*, 441 U.S. 520, 545-546 (1979), held that the rule "[u]nconstitutionally infringes upon [respondents'] right to marriage because it is far more restrictive than is either reasonable or essential for the protection of any state security interest, or any other legitimate interest, such as rehabilitation of inmates" (Pet. App. A28 (citations omitted)).

3. The court of appeals affirmed (Pet. App. A1-A18). It held that the district court properly analyzed the correspondence regulation under the "strict scrutiny" standard of *Procunier* v. *Martinez*, *supra*, under which, the court of appeals said, "censorship of prisoner mail is justified only if it furthers an important or substantial governmental interest unrelated to the suppression of expression, and the limitation is no greater than necessary to protect that interest" (Pet. App. A7). It distinguished *Pell* v. *Procunier*, 417 U.S. 817 (1974), which sustained a prohibition on face-to-face meetings between prisoners and newspaper reporters, on the ground that *Pell* dealt only with restrictions on the time, place, and manner of communication by inmates (Pet. App. A7-A8). It found that the Missouri correspondence regulation was not a time, place, and manner regulation under *Pell* because it barred correspondence between some inmates altogether.

The court of appeals also distinguished *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119 (1977), and *Bell* v. *Wolfish*, 441 U.S. 520 (1979). It concluded that *Prisoners' Union*, in which, inter alia, this Court upheld prison regulations prohibiting

the solicitation of inmates to join a prisoners' labor union and the bulk mailing of union literature to inmates, was distinguishable because the Court there found that First Amendment speech rights were "barely implicated" and that individual mailings of the literature were not banned (Pet. App. A8-A9). The court of appeals also said that "the presumption of dangerousness applied by the *Jones* Court to prisoner unions loses its force in the context of mail between two inmates in two different institutions physically separated by many miles" (*id.* at A9). The court of appeals distinguished *Bell* v. *Wolfish*, in which, inter alia, the Court sustained a regulation prohibiting pretrial detainees from receiving hardback books not mailed by the publishers or similar sources, on the ground that the detainees in *Wolfish* had other sources of reading matter whereas the prisoners here had no alternative means of communicating with particular inmates in other prisons. The court of appeals also found that letters do not pose the " 'obvious security problem' " posed by the hardback books discussed in *Wolfish* (Pet. App. A10). The court of appeals concluded that "the exchange of inmate-to-inmate mail is not presumptively dangerous []or inherently inconsistent with penological objectives" (*id.* at A12).

The court of appeals then held that the district court properly concluded that the correspondence regulation was not the "least restrictive means of achieving" the security goals of the regulation (Pet. App. A17). The court of appeals said, "As to the security concerns, we think the prison officials' authority to open and read all prisoner mail is sufficient to meet the problem of illegal conspiracies" (*id.* at A18).

The court of appeals also affirmed the district court's order striking down the marriage regulation,

again employing the *Martinez* strict scrutiny test (Pet. App. A12-A16). It again distinguished *Prisoners' Union* and *Bell* v. *Wolfish*, *supra*, on the ground that those decisions related only to restrictions on the time, place, and manner in which a right may be exercised (Pet. App. A15-A16).

SUMMARY OF ARGUMENT

The courts below tested the Missouri inmate-to-inmate correspondence regulation by the wrong standard. A convicted and incarcerated felon retains only those First Amendment rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974). The right of a prisoner to communicate with other inmates "must give way to the reasonable considerations of penal management." *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 132 (1977). And because considerations of institutional security "are peculiarly within the province and professional expertise of corrections officials" (*Pell*, 417 U.S. at 827) rights of inmate-to-inmate communication surely may, like the associational rights at issue in *Prisoners' Union*, "be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such [activities] * * * possess the likelihood of disruption to prison order or stability." *Prisoners' Union*, 433 U.S. at 132. Subjecting a rule governing inmate-to-inmate correspondence to strict judicial scrutiny, and rejecting it because (in the court's view) the prison officials' objectives can be achieved by less restrictive means, are wholly inconsistent with proper deference to the judgments of prison officials. See *Block* v. *Rutherford*, 468 U.S.

576 (1984); *Hudson* v. *Palmer*, 468 U.S. 517 (1984); cf. *Bell* v. *Wolfish*, 441 U.S. 520 (1979).

Procunier v. *Martinez*, 416 U.S. 396 (1974), which the courts below treated as controlling, does not govern this case. The *Martinez* Court did apply a strict standard to regulations providing for content-based censorship of prisoner correspondence with third parties, but only because the First Amendment rights of nonprisoners were involved. The Court said (*id.* at 408) that "an assessment of the extent to which prisoners may claim First Amendment freedoms * * * is unnecessary." It explained that "[w]hatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech" (*ibid.*). The Court added that "censorship of prisoner mail [in either direction] works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners" (*id.* at 409). Missouri's inmate-to-inmate correspondence regulation did not affect the rights of nonprisoners, and it was error to apply the *Martinez* standard in a case involving only those who have lost all rights inconsistent with their status as prisoners.

Missouri officials reasonably concluded that a rule barring inmate-to-inmate correspondence without prior approval (with exceptions for correspondence between family members and on legal matters) would serve the legitimate penological objectives of prison security and inmate safety. Federal prison officials have come to this conclusion as well, and have promulgated a substantially similar regulation. As an example of the concerns prompting such regulations,

prison systems today have a substantial and growing problem with prison gangs, whose collective activities threaten the safety of guards and fellow prisoners and the security of prisons generally. The usual method for dealing with gangs is to place their members in separate institutions so that they cannot communicate. If inmates are permitted to correspond with inmates in other institutions, they can continue to coordinate rebellious activities and rioting, to transmit orders for assaults (including lethal attacks) against guards and enemy prisoners, and to communicate about other illegal and disruptive actions. The choice is between more liberty for a given prisoner and more safety for others—guards and inmates alike.

Prison officials are amply justified in concluding that item-by-item censoring is not a satisfactory alternative: apart from the sheer burden on prison staff, censors may miss dangerous messages because of inattention or coding. Indeed, even if prison officials were required to adopt the "least restrictive means" in dealing with prisoner communications, they would be justified in judging the censorship alternative unsatisfactory.[7]

---

[7] The appropriate test for judging the constitutionality of Missouri's marriage regulation is also whether, in the reasonable judgment of prison officials, it serves a legitimate penological objective. In making the necessary judgment, Missouri officials had to respond to the totality of circumstances in that state's prison system. The federal policy restricting inmate marriages is more lenient (see 28 C.F.R. 551.10), but cf. *Bell* v. *Wolfish*, 441 U.S. 520, 554 (1979) ("the Due Process Clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions"). The United States expresses no view on the constitutionality of the Missouri marriage regulation.

ARGUMENT

MISSOURI'S REGULATION OF INMATE-TO-INMATE CORRESPONDENCE DOES NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

A. A Regulation Restricting Inmate Freedom Of Expression Should Be Sustained Against First And Fourteenth Amendment Challenge If, In The Reasonable Judgment Of Prison Officials, The Regulation Serves A Legitimate Penological Objective

A convicted and imprisoned felon "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817 (1974). The question in this case is whether a rule that restricts prisoners' freedom to communicate with other prisoners should be sustained if, in the reasonable judgment of prison officials, the restriction serves a "legitimate penological objective[]," in this case prison security, or should, as the courts below held, be subjected to strict judicial scrutiny and sustained only if it is shown to serve a compelling interest and to do so in the least restrictive possible manner.[8]

The Court has already answered this question with respect to the closely related First Amendment *associational* rights of convicted prisoners. In *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 132 (1977), the Court ruled that prisoners' associational rights (in that case, to form a union) "must give way to the reasonable considerations of penal

[8] We believe that in view of the importance of barring some inmate-to-inmate messages and the inadequacy of item-by-item censorship as an alternative, see pages 19-24, *infra*, the Missouri correspondence regulation would also survive strict scrutiny, but the Court need not reach that question in this case.

management." Elaborating, the Court said that associational rights "may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations * * * possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment" (*ibid.*). Far from engaging in "strict scrutiny," the Court accepted the prison administrators' judgment that "a prisoners' labor union would be detrimental to order and security in the prisons" with the comment that it "is enough to say that [the administrators] have not been conclusively shown to be wrong in this view" (*ibid.*).

Petitioners' rule restricting inmate-to-inmate correspondence, which limits prisoners' freedom to correspond (with each other) rather than their freedom of association, should have been judged below by the same standard. The question should have been whether the prison administrators have "reasonably conclude[d]" that such correspondence "possess[es] the likelihood of disruption to prison order or stability" (*Prisoners' Union*, 433 U.S. at 132), and the regulation should have been sustained unless the prison administrators' judgment was "conclusively shown to be wrong" (*ibid.*). The fact of incarceration and the needs of prison administration require not only that convicted prisoners give up many of the rights enjoyed by members of the general public but also that a presumption of deference to prison administrators' discretion replace, with respect to many rights, the requirement of strict judicial scrutiny.

Convicted and imprisoned felons necessarily lose not only those rights that are obviously inconsistent with incarceration, but also those rights that are in-

consistent with the safety of prison personnel and other prisoners, the protection of prison property, the administration of a large and complex facility, and the achievement of penological objectives, including deterrence and rehabilitation.[9] As the Court said in *Price* v. *Johnston*, 334 U.S. 266, 285 (1948), "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." The Court made clear in *Pell* v. *Procunier*, *supra*, that "legitimate penological objectives" come first and that a prisoner retains other

[9] In *Hudson* v. *Palmer*, 468 U.S. 517, 523 (1984), the Court noted that convicted prisoners continue to have the protection of certain specific constitutional guarantees: they must have "reasonable opportunities" to practice their religion, *Cruz* v. *Beto*, 405 U.S. 319 (1972), and they are entitled to the protection of due process, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and not to be subjected to cruel and unusual punishment, *Estelle* v. *Gamble*, 429 U.S. 97 (1976). On the other hand, the Court ruled in *Hudson* that "prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells" (468 U.S. at 530).

Cases involving rights enjoyed by prisoners as such (*e.g.*, *Estelle* v. *Gamble*, *supra*) and cases involving prisoners' access to legal processes (*e.g.*, cases involving the right to counsel, to habeas corpus, and to procedural due process) present a different problem from the present case: the rights involved in those cases must logically survive the fact of conviction and incarceration. The Court has not yet had occasion to consider the extent to which the right to "reasonable opportunities" to practice one's religion, *Cruz*, *supra*, must yield to security considerations. The right to be free of racial segregation (*Lee* v. *Washington*, 390 U.S. 333 (1968)), notwithstanding its special importance, yields to "the necessities of prison security and discipline" (see *id.* at 334; *Cruz*, 405 U.S. at 321).

rights only to the extent "not inconsistent" with those objectives (417 U.S. at 822). The Court added, "[c]hallenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law" (*ibid.*).

This Court has repeatedly recognized that the unique and difficult circumstances of prison administration require wide deference to the expert judgment of administrators, particularly in the area of prison security. In *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974), for example, the Court noted that

> courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

In *Pell* v. *Procunier*, *supra*, after noting that "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves" (417 U.S. at 823), the Court said (*id.* at 827),

> Such considerations [of institutional security and other matters] are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

In *Prisoners' Union*, 433 U.S. at 126, the Court said, "Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators." As Chief Justice Burger wrote in his concurring opinion in *Prisoners' Union*, 433 U.S. at 137:

> The solutions to problems arising within correctional institutions will never be simple or easy. Prisons, by definition, are closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society. Of necessity, rules far different from those imposed on society at large must prevail within prison walls. The federal courts, as we have often noted, are not equipped to "second guess" the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances.

The rights of convicted and imprisoned felons obviously must yield not merely to what a court may consider the compelling requirements of a prison system, imposed in the least restrictive manner, but to the discretion of prison administrators to adopt rules appropriate to the times and the circumstances of their particular institutions. In *Jones* v. *North Carolina Prisoners' Union, supra*, the Court expressly rejected the contention that the burden is on prison officials "to show affirmatively that [associational activities] would be 'detrimental to proper penological objectives' or would constitute a 'present danger to security and order' " (433 U.S. at 128). Rather, the Court said, "[t]he necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this" (*ibid.*).

The Court has made it abundantly clear that, at least where restrictions are alleged to infringe only general liberty interests and not any other, more specific guarantee of the Constitution, the notion of "compelling necessity" and "least restrictive alternative" have no part in the analysis. In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court expressly rejected, even as to challenges to conditions of *pretrial* detention, the notion that restrictions on the liberties of lawfully incarcerated persons must meet a test of "compelling necessity" (see *id.* at 533). The Court added, "Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional" (*id.* at 542-543 n.25). In *Block* v. *Rutherford*, 468 U.S. 576, 591 n.11, 1984 also involving pretrial detainees, the Court "reaffirm[ed] that [jail] administrative officials are not obliged to adopt the least restrictive means to meet their legitimate objectives." See also *id.* at 580-585. A convicted felon, who may lawfully be punished, obviously has even less right than a pretrial detainee to demand that restrictions on his liberty meet a test of "compelling necessity" or that they constitute the "least restrictive alternative."

The court of appeals applied the "strict scrutiny" standard of review used in *Procunier* v. *Martinez*, 416 U.S. 396 (1974), to invalidate restrictions on prisoner correspondence with third parties. But the Court in *Martinez* specifically declined to determine the extent to which *inmates* "may claim First Amendment freedoms" (*id.* at 408). It based its ruling squarely on the First Amendment rights of the third

parties, saying "censorship of prisoner mail [in either direction] works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners" (*id.* at 409).[10] The standard of review employed in *Martinez* is thus simply inapplicable to the regulation at issue.[11]

The court of appeals distinguished *Pell* v. *Procunier*, *supra*, and *Bell* v. *Wolfish*, *supra*, on the ground that the restrictions on First Amendment rights sustained in those cases related only to "time, place, and manner" (Pet. App. A7-A9). But in both of those cases the restrictions on communications were significant restrictions, sustained because of the needs of prison security and out of deference to prison administrators, and the fact that other means of communication were available was only a "relevant" or "influenc[ing]" factor (417 U.S. at 823-824; 441 U.S. at 551-552). Conversely, in the present case, Missouri's rule hardly deprives prisoners of all means of expression. To the contrary, it bars communication only with a limited class of other people with whom, as we show below, prison authorities have specific reason to be concerned.[12]

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[10] Shortly after deciding *Martinez*, the Court had occasion to explain: "While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, * * * this Court has not yet recognized First Amendment rights of prisoners in this context." *Wolff* v. *McDonnell*, 418 U.S. 539, 575-576 (1974) (citation of *Martinez* omitted).

[11] We do not mean to suggest that strict scrutiny is always the correct standard where non-inmates are involved. The involvement of non-inmates is a necessary but not a sufficient condition for strict scrutiny to be appropriate.

[12] The court of appeals sought (Pet. App. A9) to distinguish *Prisoners' Union* on the ground that the activities involved

At bottom, while there is no "iron curtain" between a prison and the Constitution (*Palmer*, 468 U.S. at 523), the fact of conviction and the necessities of prison administration surely change the presumptions applicable in assessing claims of infringement of constitutional rights. Governmental actions affecting constitutional rights of members of the general population, when permissible at all, must generally carry a heavy burden of justification. A convicted and imprisoned felon, however, is committed to the care and custody of prison officials who bear, under exceedingly difficult conditions, the overall responsibility for maintaining a total environment that will enhance his safety and rehabilitation and protect the safety of others. It is both essential to the operation of such a total environment and appropriate to a prisoner's status that his rights yield to legitimate penological objectives and that there be a strong presumption favoring prison officials' determinations of the conditions necessary to serve those objectives.

B. Missouri's Inmate-To-Inmate Correspondence Regulation Is Reasonably Related To A Legitimate Penological Objective

The record amply demonstrates that the inmate-to-inmate correspondence regulation was reasonably related to a legitimate penological objective. See pages

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in that case were (in its view) more dangerous. But the degree of deference due to the judgments of prison officials obviously does not change depending on whether the court thinks those judgments were correct. Here, the prison officials judged inmate-to-inmate correspondence sufficiently dangerous to warrant curtailment. The courts below simply substituted their own judgment that such correspondence is not very dangerous and then used the assumed lack of dangerousness as a reason for holding the regulation to strict scrutiny.

4-6, *supra*; Pet. App. A4, A17. See also *Vester* v. *Rogers*, No. 85-6639 (4th Cir. July 18, 1986) (upholding constitutionality of similar prison regulations); *Heft* v. *Carlson*, 489 F.2d 268 (5th Cir. 1973) (same); *Abbott* v. *Richardson*, No. 73-1047 (D.D.C. Sept. 13, 1984) (appeal pending) (same); *Schlobohm* v. *U.S. Attorney General*, 479 F. Supp. 401 (M.D. Pa. 1979) (same); *Mitchell* v. *Carlson*, 404 F. Supp. 1220 (D. Kan. 1975) (same). The testimony at trial showed that Missouri prison officials promulgated the correspondence regulation for security reasons. Officials testified, for instance, that they had a growing problem with prison gangs, and that restricting communication among their members—by sending them to different prisons and limiting their correspondence—was an essential tool in preventing coordinated activities threatening to safety and security (II Tr. 75-77; III Tr. 266-267; IV Tr. 226).[13] Similarly, the use of Renz as a facility to provide protective custody for certain prisoners could obviously be compromised by inmate-to-inmate correspondence (III Tr. 264-265). A corrections official further testified that he

[13] The testimony in the district court, described in the text, that prison gangs were a growing problem in Missouri is entirely plausible. A federally funded study shows that prison gangs are present in 32 state systems as well as the federal system (G. Camp & C. Camp, U.S. Dep't of Justice, *Prison Gangs: Their Extent, Nature and Impact on Prisons* vii, 19 (1985) [hereinafter *Prison Gangs*]). Nationwide, prisons reported a total of 12,634 gang members who constituted 3 percent of the population of state and federal prisons (*id.* at 19). The study indicates that Missouri "reported a large number of gang members (550), a relatively high percentage of all inmates as gang members [6.7 per cent] and the highest percentage of inmate problems caused by gangs (90 percent) in the United States" (*id.* at 19, 154, 159).

believed the spread of a riot in one prison to other facilities was averted by the inability of prisoners at different facilities to communicate readily (II Tr. 74). Respondents did not demonstrate that petitioners' "fears as to future disruptions are groundless" or "unreasonable" (*Prisoners' Union*, 433 U.S. at 127-128 n.5, 128); there was, conversely, no burden on the Division of Corrections to demonstrate that, without its regulation, there was a present danger to security (*Wolfish*, 441 U.S. at 551 n.32). Communication with other felons is the sort of contact which is prevented as a matter of course even after the prisoner has been released on parole (see, *e.g.*, 28 C.F.R. 2.40(a)(10) (conditioning federal parole on non-association with known criminals, unless permission is granted by the parole officer).[14]

Item-by-item censorship is not, in the judgment of prison officials, an adequate alternative to restricting correspondence. Missouri and Kansas officials so testified, see pages 5-6, *supra*, and the district court in *Abbott* v. *Richardson*, No. 73-1047 (D.D.C. Sept. 13,

[14] See also 28 C.F.R. 2.40(a)(6) and 570.36(d) (Table I, para. 8); *United States* v. *Holloway*, 740 F.2d 1373, 1383 (6th Cir.) (upholding similar restrictions), cert. denied, 469 U.S. 1021 (1984); *United States* v. *Romero*, 676 F.2d 406, 407 (9th Cir. 1982) (same); *United States* v. *Lowe*, 654 F.2d 562, 567-569 (9th Cir. 1981) (same); *United States* v. *Furukawa*, 596 F.2d 921, 922-924 (9th Cir. 1979) (same); *United States* v. *Albanese*, 554 F.2d 543, 545-547 (2d Cir. 1977) (same); *Bagley* v. *Harvey*, 718 F.2d 921, 925 (9th Cir. 1983) (requiring only "rational basis" for restriction); *United States* v. *Albanese*, 554 F.2d at 547 (requiring " 'reasonable nexus between the probation conditions and the goals of probation,' " quoting *Malone* v. *United States*, 502 F.2d 554, 556-557 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975)).

1984), slip op. 11-12 (appeal pending), so found on the basis of federal officials' testimony (see pages 23-24, *infra*). While the matter was not explored in depth below, the federal officials testified in *Abbott*—and it is obvious—that the sheer quantity of correspondence, the tedium of reading it, and the ability of inmates to use jargon or more sophisticated codes to escape detection of their real messages, make item-by-item censorship a very unsatisfactory way to protect security.[15]

In considering the reasonableness of a California prison regulation in *Martinez*, 416 U.S. at 414 n.14, the Court said that, "[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."[16] The Missouri inmate-to-inmate correspondence regulation at issue is substantially similar to the federal Bureau

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[15]See also *Prison Gangs*, page 20 note 13, *supra*, at 130 (discussing "frequent[]" use of coded correspondence by gangs in federal prison). The amicus brief filed in this case by the State of Texas contains further examples of codes used by prisoners.

[16] The Missouri regulation is also consistent with Section 12.02 of the Federal Standards for Prisons and Jails (1980). See also American Correctional Association, *Standards for Adult Correctional Institutions* 2-4370 (2d ed. 1981) (limit on source of mail permitted "when there is a reasonable belief that the limitation is necessary to protect public safety or institutional order and security"). But compare ABA Standards for Criminal Justice 23-6.1 (1980) (while "restrictions on correspondence with other prisoners might well pass constitutional muster," the standard proposed nonetheless requires that such restrictions meet the same "least restrictive" standard that governs restrictions on correspondence with nonprisoners).

of Prisons regulation on the same subject.[17] The present federal regulation was promulgated October 1, 1985, as part of a general revision of correspondence regulations to clarify them and address interpretation issues that had arisen since promulgation of earlier regulations (50 Fed. Reg. 40106 (1985)).[18] In promulgating the revised correspondence regulation—which was substantially the same as its predecessors—the Bureau of Prisons stated that it "believes its rule is necessary to help ensure institution security and good order. The rule clearly identifies the specific conditions under which such correspondence is allowed, and allows the Warden to approve additional reasons in other exceptional circumstances" (*id.* at 40107). See also 45 Fed. Reg. 44223 (1980).

The federal inmate-to-inmate correspondence regulation was recently upheld, against challenges similar to the attacks on the Missouri correspondence regulation, in *Abbott* v. *Richardson*, No. 73-1047 (D.D.C. Sept. 13, 1984) (appeal pending). The *Abbott* court wrote (slip op. 11-12) that prison officials had testified that

> prisoner-to-prisoner mail could be used for communication between members of prison gangs:

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[17] See pages 1-2 note 1, *supra*.

[18] The Bureau of Prisons originally proposed approval of inmate-to-inmate correspondence between persons other than close relatives or parties and witnesses in the same court action "only if the correspondence * * * [i]nvolves a relationship between the confined inmates which existed prior to commitment and both institutions agree that the correspondence is beneficial to both inmates" (proposed 28 C.F.R. 540.15 (b) (3) (42 Fed. Reg. 26337 (1977)). See also 44 Fed. Reg. 35957 (1979); Bureau of Prisons Operations Memorandum 7300.133 at 6 (Dec. 20, 1972).

in particular it could be used to arrange assaults on inmates who are transferred under the [federal system's] protective custody program. Testimony on the conduct of prison gangs indicated that this is not a remote possibility. There was evidence, too, that prisoners have succeeded in sending letters to one another in order to carry on drug transactions and formulate escape plans. The [prisoners] suggest that the risk of such problems could be handled by monitoring correspondence; but the [officials] reply that they could not hope to monitor a sufficient number of letters, and in any event, prisoners could easily write in private jargon that prison authorities would not understand. Thus no less restrictive policy than a general ban on inter-inmate correspondence is in the interest of security. The court sustains this position.

The testimony given by federal officials and accepted by the court in *Abbott* thus underscores the serious security problems posed by inmate-to-inmate correspondence and the impossibility (because of volume and the use of jargon or code) of relying on item-by-item censorship. Prohibiting such correspondence is an entirely reasonable step in pursuit of the legitimate objective of penal security.[19]

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[19] The fact that the ban on inmate-to-inmate correspondence is not perfectly effective to stop all communication between inmates of different prisons (*e.g.*, a third party on the outside could broker information) does not preclude a prison from invoking it. A net with a hole in it (of indeterminate size) is better than no net at all.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 85-1334

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY,
Employees of the Department of Corrections and Human Resources for the State of Missouri,
Petitioners,

V.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similary situated people,
Respondent.

DR. LEE ROY BLACK; DAVID W. BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT,
Employees of the Department of Corrections and Human Resources for the State of Missouri,
Petitioners,

V.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similary situated people,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For The Eighth Circuit

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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22pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, *continued*

No. 85-1384

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

WILLIAM R. TURNER; CATHY CROCKER;
EARL ENGELBRECHT; BETTY BOWEN;
BERNICE E. TRICKEY; HOWARD WILKINS;
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On Writ of Certiorari to the United States
Court of Appeals For The Eighth Circuit

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTERESTS OF AMICUS CURIAE

Pursuant to United States Supreme Court Rule 36.4, the State of Texas, by and through its Attorney General, files this brief as amicus curiae in support of petitioner. Texas has had significant experience in the Texas Departmet of Corrections (TDC) with inmate-to-inmate correspondence and supports her

sister state's contention that this correspondence undermines security in a state's prison, while serving little, if any, useful purpose. Texas thus contends that states should be free to prohibit or limit all inmate-to-inmate mail.

TDC's correspondence policies are found in TDC's *Correspondence Rules,* which were adopted pursuant to a lengthy class action litigation known as the *Guajardo* case. *See Guajardo v. Beto,* 349 F.Supp. 211 (S.D. Tex. 1972), *vacated and remanded sub nom. Sands v. Wainwright,* 491 F.2d 417 (5th Cir. 1973), *cert. denied,* 416 U.S. 992 (1974); *Guajardo v. Estelle,* 432 F.Supp. 1373 (S.D. Tex. 1977) (on remand), *rev'd in part,* 580 F.2d 748 (5th Cir. 1978); *Guajardo v. Estelle,* 568 F.Supp. 1354 (S.D. Tex. 1983) (on remand) *aff'd sub nom. Franks v. McKaskle,* No. 83-2508 (5th Cir. July 1984).

In partial settlement of *Guajardo,* in 1978, TDC agreed to provide for unlimited inmate-to-inmate mail in its *Correspondence Rules.* TDC's experience in the years since 1978 has convinced the department that a serious mistake was made in agreeing to allow inmate-to-inmate mail. In October 1985, TDC moved for modification of the agreed injunction in *Guajardo* to allow the department to prohibit inmate-to-inmate mail. *See Defendant's Motion to Modify the Correspondence Rules, Guajardo v. McCotter,* Civil Action No. 71-H-570 (Oct. 1985).

In January 1986 a hearing was held on this motion.[1] At the urging of the district court, the hearing was recessed to determine if the motion could be compromised. The parties did settle on a compromise that allows TDC to restrict inmates whom are adjudicated guilty of serious violations of the *Correspondence Rules* from sending or receiving further inmate-to-inmate mail for up to two years.

While it may prove helpful, this new provision is not nearly enough of a restriction to meet the department's needs. TDC nevertheless agreed to compromise because something was better than nothing, which is what the district court made clear

1. A copy of the transcript of the hearing along with some of the exhibits introduced into evidence has been lodged with the Clerk of the Court. Citations to this lodging will be noted as ("L". at _____."). Texas offers this lodging to illuminate the facts that should inform the Court's legal conclusions.

TDC was going to get unless it settled. (L. at 122-134.) The district court's comments during the hearing implied that the district court strongly believed the case was controlled by *Procunier v. Martinez,* 416 U.S. 396 (1974), rather than *Pell v. Procunier,* 417 U.S. 817 (1974). The Eighth Circuit decision in *Safley* had just been decided, which the *Guajardo* plaintiffs touted to the district court. Had this Court already clearly announced that *Pell* controlled and inmate-to-inmate mail could be prohibited, TDC would either have won in the district court or appealed. In the face of a hostile district court and uncertain law, however, TDC could not suffer the length and cost of further litigation. While the dye has been cast for Texas, she wishes better for her sister states.

That *Pell* controls and the first amendment does not protect inmate-to-inmate mail is well explained in the briefs of Missouri, Iowa, and the United States. In this brief, Texas will limit herself to explaining why inmate-to-inmate correspondence is dangerous, why it cannot be effectively monitored or controlled, and why its prohibition does significantly increase security.

SUMMARY OF ARGUMENT

The circuit court erred when it concluded that the security concerns presented to prison officials by inmate-to-inmate correspondence were of minimal significance and that a ban on inmate-to-inmate mail was overly restrictive and an unconstitutional infringement of the First Amendment.

Seven years experience in allowing inmate-to-inmate correspondence has convinced Texas that the security risk created by inmate abuse of the privilege is both real and substantial, including murder, drug traffic, and gang activity.

Any response less restrictive than a general ban on correspondence between inmates does little to enhance security. Effective monitoring is impossible. First, there is too much mail. Second, prisoners, particularly gang members, engage in all manner of deception and subterfuge in order to circumvent monitoring procedures. Gang jargon and codes are easily employed in order to ensure that messages, including instructions to kill, are transmitted undetected throughout the system.

Texas agrees with the contention of petitioner that a state should only be required to show a rational basis for implementing a ban of inmate-to-inmate correspondence, and that such a rational basis does, in fact, exist. In any case, given the ex-

perience of the Texas prison system, such a ban is the only effective, and therefore the least restrictive, means of controlling this threat to security.

ARGUMENT

I.

THE EIGHT CIRCUIT VIEW OF THE THREAT POSED BY INMATE-TO-INMATE MAIL IS MISINFORMED

TDC is the second largest state prison system in the nation, housing 38,000 prisoners in twenty-seven facilities. A survey of all prison unit mailrooms in early 1985 disclosed that 33,918 pieces of inmate-to-inmate mail were handled during a two week period.[2] There is no practical means by which TDC can effectively monitor and censor that amount of mail.

Over the past three years, TDC has witnessed a dramatic increase in the number of inmate gangs, gang members, and gang violence. In late 1985, there were six organized groups operating within TDC, with known or suspected membership totaling around 1200. Prison officials are not at all confident that they had identified all members, and are certain that an unknown number of sympathizers and associates exist throughout the system. (L. at 106-110.) TDC estimates that approximately thirty-seven prison homicides in 1984-85 were gang-related killings. (L. at 110.)

Extensive intelligence gathering has revealed that by far the most significant means of corresponding between gang members is through the use of the United States mail. TDC has been plagued by the very security threats posed by inmate correspondence which have been dicussed in past court opinions. Through the mail, prisoners have conducted drug transactions, formulated escape plans and planned gang-related assaults. (L. at 18-28, 51-53, 141-161, 167-174.) *Abbott v. Richardson*, No. 73-1047 slip op. at 3 (D.C.D.C., Sept. 13, 1984) (Bryant, J.); *Mitchell v. Carlson*, 404 F.Supp. 1220, 1224 (D. Kan 1975). They have circumvented protective interfacility

2. Since mail is processed at both the sending and receiving unit this figure actually counts much of the same mail twice. However, the processing and monitoring function must be done at each unit to have any degree of effectiveness, so the time and effort involved is the same as if there were 33,918 separate mailings. Of course this figure does not include the much greater amount of mail to and from the outside, which also must be processed. (L. at 175-186.)

transfers. *Watts v. Brewer*, 588 F.2d 646, 650 n.6 (8th Cir. 1978); *Peterson v. Davis*, 415 F.Supp. 198, 200 (E.D. Va. 1976). They have planned further crimes and generally disrupted effective operation of the corrections system. *See Mitchell v. Carlson*, 404 F.Supp. 1220, 1224 (D. Kan. 1975).

When messages involve obvious gang business or murder they are usually coded or hidden in some manner. The methods vary from the simplest of greetings or innocent phrases that have special meaning only to the knowledgeable reader, to sophisticated number and letter codes that take great time and patience to decipher. When faced with a large number of ingenious inmates with a great deal of time on their hands, a tremendous volume of inmate mail to process, and a limited staff without the ability and knowledge necessary to effectively monitor the mail, the task becomes impossible. TDC firmly believes that this open avenue of largely unrestricted communication is a very significant factor in the growth of gangs and gang violence over the past three years. Interviews with former gang members, together with confiscated inmate mail, has revealed that serious assaults and homicide have resulted both directly and indirectly from messages sent through the mail.

Missouri and other states who have not allowed correspondence between inmates are handcuffed in their effort to produce evidence as to security risks involved in inmate correspondence because they do not have personal experience with the dangers. Based upon the limited record Missouri could provide, the Eighth Circuit wrongly, indeed foolishly, concluded that "...the presumption of dangerousness applied by the *Jones* Court to prisoner unions loses its force in the context of mail between two inmates in two different institutions physically separated by many miles." *Safley v. Turner*, 777 F.2d 1307, 1311 (8th Cir. 1985).

The Eighth Circuit's conclusion underscores the wisdom of this Court's oft-repeated caution that prison administrators must be given broad discretion in the adoption and execution of policies involving institutional security and that courts are ill-equipped to supply the specialized expertise required in this type of decision making. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct.

1861 (1979); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800 (1974); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532 (1977). For it is the very ability of "two inmates in two different institutions physically separated by many miles" to communicate information in a fast and efficient manner that has greatly assisted inmate gangs in conducting their everyday business of disruption and violence and in spreading like a cancer from one unit through the entire prison.

The experience of TDC shows that—far from being exaggerated as the *Safley* court suggests—the security concerns of prison officials about inmate-to-inmate correspondence are real and substantial. In contrasting what it considered the minor security concerns inherent in inmate correspondence with the serious potentiality for trouble presented by prisoner union activities in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, the *Safley* court stated:

> First Amendment associational rights, the *Jones* court acknowledges, were more directly implicated but were still subject to a reasonableness standard. *Id.* at 132, 97 S.Ct. at 2541. This was a reflection of the Court's concern with the special dangers inherent in concerted group activity by prisoners. The Court noted the "ever present potential for violent confrontation and conflagration" among inmates, and the fact that "a prisoners' union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots." *Id.* at 132-33, 97 S.Ct. at 2541.

Safley at 1311. Prison gangs and their growth and violence have provided much more than a "potential" trouble spot for Texas prison officials. The "special dangers inherent in concerted group activities by prisoners" have manifested themselves in widespread gang activity, including many homicides. Inmate-to-inmate correspondence has been directly connected to much of this activity. The fears and dangers addressed by this Court in *Jones* are exactly the ones presently being confronted by TDC. Reasonable prison officials might well seek to restrict inmate-to-inmate mail privileges under such circumstances.

In a further attempt to distinguish adverse case law, the Eighth Circuit contrasted the ban on hardback books upheld in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979), to Missouri's ban on inmate-to-inmate correspondence. The court noted that hardback books, unlike letters, could easily conceal contraband. Additionally, the Eighth Circuit noted the small amount of inmate-to-inmate mail allowed by Missouri could be easily opened and scanned by a single prison officer on a daily basis. *Safley* at 1311-1312. The Eighth Circuit concluded that a letter does not present "the same sort of 'obvious security problem' as does a hardback book." *Safley* at 1312. Given the Eighth Circuit's speculative factual premise, its conclusion may follow. The flaw is in the factual premise. The Eighth Circuit did not understand the realities of inmate-to-inmate mail, showing again the danger in lawyers attempting expert security judgments.

II.

WIDESPREAD ABUSE OF THE INMATE-TO-INMATE CORRESPONDENCE PRIVILEGE CREATES SERIOUS SECURITY PROBLEMS

The use of inmate-to-inmate correspondence to conduct all varieties of gang business has been well documented in the TDC system. In the district court hearing to modify TDC's *Correspondence Rules*, mentioned earlier, a TDC inmate and ex-Texas Mafia (TM) gang member discussed in detail how inmate-to-inmate mail was used to investigate and recruit potential members. (L. at 21-24.) He also detailed how he personally sent letters to other units to keep a lookout for an individual who had been transferred after a stabbing incident. The sole purpose of the correspondence was to make members on other units aware that the victim had not been killed and that the job should be completed if he appeared on their unit. (L. at 19-21, 286-288.)

This inmate also testified that correspondence played a significant role in the death of inmate David Robidoux in September of 1984. Robidoux was transferred from Ramsey II Unit to the Eastham Unit. These units are a substantial distance apart and the only reliable means of regular inmate

communications is through the mail. Robidoux, a Texas Mafia member, had been locked up in segregation before his transfer from Ramsey II under what members there felt were curious circumstances. Letters travelled to members on Eastham in which this information was discussed, and the conclusion eventually reached was that Robidoux was an informant and needed to be killed. Shortly after his arrival at Eastham, he was stabbed and killed by TM members. (L. at 29-35, 289-293.) Subsequent to this stabbing, another "hit" letter was sent out through the mail by TM members to kill an inmate who had been transferred from Eastham Unit after witnessing the Robidoux killing. This inmate was also attacked on his new unit. (L. at 35-36.)

The deposition testimony of Salvador Buentello, TDC's gang expert, further explains gang misuse of mail privileges. Buentello testified that recruiting, drug transactions, and the planning of assaults all occur through the mail. Specifically, his investigations and interviews with former gang members revealed that at least four additional known assaults involving death or serious injury were tied to the mail. (L. at 141-161.)

Inmate Ronnie Evans was chairman of the Aryan Brotherhood (AB) white supremacy gang at the Eastham Unit. He received instructions through the mail from "Steering Committee" members on other units to carry out certain "hits" ordered by gang leaders. Evans failed to carry out the mail ordered hits and consequently letters were sent to other members to assasinate Evans. Evans was subsequently attacked and stabbed on the Eastham Unit by several gang members. (L. at 151-154, 258-274, 294-297.)

Buentello received information from two sources that gang letters were sent out containing a reference to "taking out the trash." One ex-gang member admitted that he clearly understood this phrase to mean that inmate Melvin Douglas, nickname Trash Can, was to be killed as soon as possible. Subsequent to these mailings, Melvin Douglas was killed on the Ellis II Unit of TDC. (L. at 154-156, 298-300.)

Inmate Steve Garcia was a Texas Syndicate (TS) member who had been paroled. Unknown to him, he had been marked

for death by the gang over unpaid debts to a gang member. When he returned to TDC he was processed through the Diagnostic Center. Word went out through the mail from Diagnostic to Ellis I Unit that Garcia was in the system and to be on the lookout for him. Ellis I sent the word to other units. By the time Garcia completed the diagnostic process and transferred to his unit of assignment, word of his troubles and the gang's solution was well known by members; he was killed several hours after arriving at the unit. (L. at 156-159, 303-306.)

Raphael Jacquez was a TS member serving at the Retrieve Unit of TDC. It was determined by a member on another unit that Jacquez had wronged a member and was unworthy of TS membership. The only way out of TS is through death, so orders were sent through United States mail to Retrieve Unit to kill Jacquez, and he was subsequently stabbed to death. (L. at 159-161, 224-225, 301-302.)

As these cases illustrate, the most important and effective means of communication for gang members is through the avenue of regular mail service. It is relatively fast and dependable. Other methods exist (legal visits between inmates, messages mailed through outside sources, messages carried by transferring inmates), but none are as dependable and as much in the inmates' control as mail service. The evidence, in the eyes of TDC officials, overwhelmingly shows that gangs rely heavily on the ability to correspond through the mail and that disruption of this communication link would cripple them much more severely than any alternative action. (L. at 17-19, 50-53, 141-142, 168-169.)

The courts should not substitute their judgment for that of prison officials under circumstances such as these. Nor should it matter that other less effective avenues of communication are available to inmates bent on wrongdoing. All security measures can be circumvented, but those responsible for security must nonetheless take reasonable steps to control violence and disorder. A prison system should not be "required to forego controlling one means of communcatiosn where it cannot controll all means." *Abbott v. Richardson*, No. 73-1047 slip op. at 3 (D.C.D.C., Sept. 13, 1984) (Bryant, J.). Those controls

that can be maintained, must be maintained to ensure, to the extent possible, the safety of staff and inmates.

III.

NO MEANS SHORT OF A GENERAL BAN ON IN-MATE-TO-INMATE CORRESPONDENCE WILL END THE ABUSE WHICH THREATENS SECURITY AND SAFETY

Respondents, as well as the Eighth Circuit, argue that the general prohibition of inmate correspondence is overly restrictive and that the proper response for a prison system is to monitor inmate mail and thereby restrict the flow of illicit communication. In a system such as TDC, with 38,000 inmates and many units throughout the state, the task of simply processing the tremendous volume of mail is enormous. The energy and expense necessary to properly staff each of twenty-seven mailrooms with knowledgeable monitors who have bilingual abilities as well as knowledge of gang jargon and codes would be overwhelming. A penal institution's financial resources should be considered when prisoners challenge the constitutionality of its practices. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979); *Ruiz v. Estelle*, 679 F.2d 1115, 1146 (5th Cir. 1982) ("[T]he cost of one proposed remedy in comparison with the cost of others and the demonstrable need for the remedy should both be considered"). *See Pell v. Procunier*, 417 U.S. 817, 826, 94 S.Ct. 2800, 2806 (1974) ("institutional considerations, such as security and related administrative problems," may justify limits on prisoner communications).

Upholding the Federal Bureau of Prisons' rule while refusing to require costly alternatives, one court put the matter this way:

> Ideally we would like to allow this correspondence, and to direct the prison officials to monitor each letter for threats to security or order. But *in practical terms such an Order would cause shifts in manpower, it would result in a need for more help, more money,* and changes in the administration of the entire system of mailing. We cannot act as administrator, and we will not substitute our judgment for that of

> the prison administrators... [w]e are satisfied that [the rule] is as narrowly drawn as the prison system allows.

Schlobohm v. U.S. Attorney General, 479 F.Supp. 401, 403 (M.D. Penn. 1979) (emphasis added).

Moreover, experience would indicate that no amount of monitoring, regardless of the resources committed, would effectively curb the abuse of the mail privilege. Inmates at TDC have developed an incredible range of methods to circumvent attempts at censoring inmate-to-inmate mail. The following examples have been obtained through investigation, searches, interviews with inmates, and confiscation of mail; they vary from the simple and straightforward to the sophisticated and complex.

Inmates know that not all mail can be completely monitored. Gang members whose mail is being closely watched or who have been restricted merely use a "clean" inmate who is a secret sympathizer or who has been threatened or intimidated to send out their important gang mail to other members or secret sympathizers. (L. at 27-28.)

Inmates are aware of the abilities of mailroom monitors. Often, bold messages dealing with gang business are sent hidden only by use of the Spanish language if members feel confident that no one can decipher the language, or their own "Tex Mex" variety of it. Two letters included in the Texas Lodging, confiscated in late 1985, are representative of this type of gang communication. They involve inflamed rhetoric by members of the Mexican Mafia (MexiKanemi or E.M.E.) concerning their on-going "war" with the TS. This war resulted in several prison homicides in mid-1985, most victims being members of E.M.E. (L. at 247-257.)

In a cynical dissent in a very recent Fourth Circuit case, which upheld a ban on inmate-to-inmate mail, Judge Murnaghan stated that "the more innocuous a statement might seem, the more devious at cryptography the authorities might assert the would-be communicator to be." *Vester v. Rogers*, No. 85-6639 (4th Cir. July 18, 1986) (Murnaghan, J., dissenting).

Such assertions by Texas prison authorities, however, are not based on some unreasonable attempt at creative argument, but on their experience gained through dealing with gangs and gang correspondence. (L. at 25-26, 162-165.)

TDC has confiscated a copy of the constitution of the Aryan Brotherhood, one of the largest and most vicious gangs operating in the prison. (It is interesting to note that this writing was disguised within the text of a class action legal document.) This constitution discusses the duty of different units to stay in communication with one another and the methods by which to accomplish this end. (L. at 187-198.) Concerning the important area of correspondence in recruitment of members the constitution states:

> IV. If a chairman submits a candidate's name to his S.C. (Steering Committee) member, he should word it as follows: "John Doe wants to know how life is over there." When the S.C. has made its investigation, and if the candidate is to be approved, and placed in training, the S.C. will respond as follows: "Tell John Doe that life is fine." If the candidate is denied, the S.C. will say, "Tell John Doe that life is bad." (L. at 194.)

In discussing the area of gang-ordered killings and the proper procedure to be employed, members are informed as follows:

> J. The S.C. must keep all units informed of the plaintiff-class hit list. The chairman/captain on each unit will be responsible for keeping his hit list up to date, and carrying out those assignments on his individual unit. Unless there is no question, such as a plaintiff that deserts or an automatic emergency situation, a chairman will consult his assigned S.C. member before ordering a hit. This is to ensure that no false moves are ordered. If the hit is ordered but cannot be carried out at its assigned time, the S.C. (all five) must be informed of the problems involved:
>
> I. All additions to the plaintiff-class hit parade list will come from S.C. members only. No exceptions, unless there is no doubt as defined earlier.

> If an individual is to be added to the hit list, the S.C. over his unit will say, "John Doe (individual's name) got a write-up the other day. When this is spoken, you add John Doe's name to your parade list. (A good stash place for this list is.....
> (L. at 195.)

Throughout the document legal terms such as "plaintiff" and "plaintiff-class" are used to refer to the gang and its members. Investigation has revealed that other legal phrases, as well as all types of other innocuous words and phrases, have been added to the underground vocabulary of the AB and other gangs. "File a brief," "file an affidavit," "file a writ," "file a suit," in AB parlance, are all instructions to kill another inmate. Depending on how it is used in a sentence and what is already known about an individual, "give our regards to John Doe" could mean that the inmate is to be killed, or that the inmate has been approved for AB membership. (L. at 199-205.) TDC's list of gang phraseology now includes in excess of 100 phrases, and of course many have not been uncovered.[3]

If mail censors confiscated each piece of mail in which one of these phrases appeared, nearly all mail would be banned. On the other hand, if mail was only stopped when monitors were sure hidden meaning existed, virtually all mail would go through. This dilemma confronts mailroom personnel daily.

The gang assault on inmate Ronnie Evans, discussed above, exemplifies efficient gang use of these kinds of innocuous phrases. Letters, confiscated after the attack, reflect the increasing displeasure of gang leaders with Evans' work. (L. at

---

3. The Texas Lodging includes confiscated letters in which several of the listed terms are used. One letter states "we just filed suit against Texas Monthly Magazine" and advises caution since they are "Trying to file a countersuit at the same time." The underlying meaning is that AB has put out hits on Texas Mafia members and TM is seeking to strike back.

Another letter states: "A fried of mine was going to Austin Babtist College and he let us know about them Texas Medical changing colleges." The letter continues in this vein with more innocuous information. In fact, this letter is a discussion between two gang members concerning the significant defection of Texas Mafia members to the rival AB. (L. at 275-284.)

253-274.) In a September 6, 1985, letter, Evans was told, in connection with certain members marked for killing due to their own failure to carry out ordered hits:

> Hey Bro
>
> Look, that one with the legal work should of filed when the court told him too 5 months ago. But he didn't nor did the other one that was on the suit. The court gave them both ample time to deal with it and they chose not to. It was just that they failed to defend the class action as the United States Constitution calls for, Period.....
>
> You can tell the other plaintiff's that if anyone neglect, the same ruling will be passed on them.....
>
> If you take care of whats to be *and* regain contol of the class plaintiff's I'll personal writ your judge(s) and take a stand.

(L. at 259.)

Letters sent to Evans over the next several months by AB members urged him to take care of the Eastham hits as ordered by the "Court." A November 16, 1984, letter implored "but Ronnie man, you need to have that other brief prepared and filed from out there Bro as soon as possible man." (L. at 271.)

Finally, a letter was sent from Ellis Unit to another AB member at Eastham on November 20, 1984, that sealed Evans' fate:

> November 20, 1984
>
> Bros,
>
> In reference to the class action, *Ruiz v. Procunier,* a recent Supreme Court RULING has taken place and it is by order of the Court that inmate John S. Montes replace Ronnie Evans in heading and coordinating the present litigation in the class action entitled *Ruiz v. Procunier.*

> This is the result of an "en banc" (unanimous) opinion of the Court and there seems to be a mistaken opinion that such Court Orders are appealable. This *is not* the case! The Supreme Court defines the law as the law is, and so it stands.
>
> Each and every plaintiff in the above entitled class action is fully expected to abide by this Ruling, and the recipients of this notice are to help circulate and inform plaintiffs of this Ruling.
>
> Love and Respect,
>
> Bosco

(L. at 274.)

On December 1, 1984, in the Eastham Unit dining room, Ronnie Evans was attacked and stabbed by several AB members. (L. at 294-297.)

Codes create another major obstacle to effective monitoring of Inmate mail. Even if the code is discovered, it is a losing proposition to expect to catch all the correspondence making use of it. Cryptic messages properly hidden will constantly sneak past the best of busy monitors. (L. at 162-166, 21-27, 37-40.)

Among the codes TDC first uncovered was one used by TS which employed a Braille system and was designed by an inmate who was going blind. A series of grouped dots spread throughout a letter would form the hidden message. As time progressed, TS developed another code using both dots and symbols. (L. at 217-218, 230-231.) Inmate letters are routinely filled with such drawings and symbols, and so these letters initially aroused little suspicion.

As gangs have proliferated at TDC, so have the variety and sophistication of codes. Apparently, the most effective and widely used code, which has several variations, is a numerical or "direct substitution" code. Basically, each letter of the alphabet is assigned a different number and the numbers are incorporated throughout the innocent version of the correspondence to form messages. The recipient then pulls all the

numbers and translates them to letters thereby "decoding" the message. The number-letter relationship can be changed by prearranged agreement or through some tip off in the message itself. This allows for continued use of the code despite the fact that authorities might break the version being employed. To apply twenty six variations to each inmate letter containing numbers, is to ask the impossible of any mail monitor. (L. at 206-216, 36-48.)

The ex-Texas Mafia member, whose hearing testimony has previously been discussed, gave a detailed explanation of gang use of this type of code, including how he personnally used it in sending messages concerning gang recruitment and hits. Additionally, his testimony included working through a sample coded letter which he himself had written and an explanation of how this garden-variety inmate letter actually reduced down to an order to kill the unit warden. The method by which he had hidden the all-important code indicator in the letter required a trial and error method of decoding which would take even a person in the know a significant period of time to resolve. But as the witness explained, unlike a TDC mail monitor, the one thing an inmate has is plenty of time. (L. at 36-48, 83-88.)

The latest innovation in secret correspondence used by AB, and perhaps other gangs as well, involves the use of soap (or very recently, egg white) diluted in water and then applied to paper with any type of sharply pointed object. An "invisible" message can be written on the edges or between the lines of the innocent "cover" letter. In order to effectively screen a letter for this type of hidden message, the page must be held to a bright light. (L. at 24-25, 219-222.)

All these methods, and perhaps many others, are being used today within the Texas prison system in an effort to circumvent the mail monitoring effort. No doubt many are effective. It is unreasonable to believe that prison officials could ever obtain sufficient resources or expertise to adequately screen the huge volume of mail moving through the system on a daily basis. Moreover, it is folly to suggest that the Constitution compels a state to spend funds on such an effort in order to preserve the correspondence rights of inmates in prison.

CONCLUSION

Texas' experience demonstrates that a state's interest in banning inmate-to-inmate mail in order to provide security and order within the institution is not only reasonable, but the least restrictive method to accomplish that end.

Respectfully submitted,

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No. 85-1384

In The
Supreme Court of the United States
October Term, 1986

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, Employees of the Department of Corrections and Human Resources for the State of Missouri,

Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,

Respondents.

DR. LEE ROY BLACK; W. DAVID BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT, Employees of the Department of Corrections and Human Rescurces for the State of Missouri,

Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

NOTICE OF MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF PRISONERS' LEGAL SERVICES OF NEW YORK, INC., PRISON FAMILIES OF NEW YORK, JEROME N. FRANK LEGAL SERVICES ORGANIZATION (CONNECTICUT), AND CITIZENS UNITED FOR REHABILITATION OF ERRANTS (WASHINGTON, D.C.)

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No. 85-1384

In The

Supreme Court of the United States

October Term, 1986

WILLIAM R. TURNER, et al.,
Petitioners,

v.

LEONARD SAFLEY, et al.,
Respondents.

NOTICE OF MOTION OF PRISONERS' LEGAL SERVICES ET AL. FOR LEAVE TO FILE AN AMICI BRIEF

PERSONS:

PLEASE TAKE NOTICE that upon the annexed affidavit of ROBERT SELCOV, Prisoners' Legal Services of New York, and other proposed *amici curiae* move this Court for leave to file a Brief *Amici Curiae* pursuant to Supreme Court Rule 36.3.

Dated: September 8, 1986

Yours, etc.,

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Supreme Court of the United States

October Term, 1986

—o—

WILLIAM R. TURNER, et al.,
Petitioners,
v.
LEONARD SAFLEY, et al.,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
No. 85-1384

—o—

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss:

ROBERT SELCOV swears that:

1. I make these statements in support of the motion of proposed *Amicus,* Prisoners' Legal Services of New York, for leave to file a brief *Amici Curiae* in this case, to be co-sponsored by Prison Families of New York, the Jerome N. Frank Legal Services Organization, and Citizens United for Rehabilitation of Errants. A full statement of the interest of proposed *amici* is appended to the Brief (Appendix A thereto).

2. Attorneys for the respondent have consented to the filing of this *Amici Curiae* brief. Attorneys for petitioners have refused their consent. (Appendix A to this affidavit).

3. Prisoners' Legal Services of New York is interested in this cas because it currently represents prison-

ers who have been denied the right to marry and has also represented prisoners who wished to correspond with other prisoners. These two issues are directly raised in this case.

4. I believe the Brief deals squarely with the following issues which were not fully addressed by the parties below and have not been addressed in briefs provided to this Court to date:

a) Since defendants-petitioners (defendants) have conceded that marriage is a fundamental right for prisoners, the parties have not directly addressed the issues posed by this Court's summary affirmance in *Butler v. Wilson,* 415 U.S. 953 (1974) (affirming without opinion a three judge district court decision denying that prisoners have a fundamental right to marry). *Amici* have fully discussed the import of *Butler* and its relationship to subsequent decisions of this Court.

b) *Amici* provide an alternative analysis of Supreme Court precedent to support the idea that heightened scrutiny should apply to the prison administrative policies at issue.

c) *Amici* provide the Court with the scientific and sociological literature concerning the rehabilitative advantage of allowing prisoner marriages, which directly refutes defendants' contention that marriage is harmful.

d) *Amici* provide the Court an analysis of cases demonstrating the need for strict judicial review of prison administrative action impinging First Amendment rights.

5. Prisoners' Legal Services has had many years of experience as a prisoners' legal advocacy organization.

I believe that this experience and perspective differ from that of the parties and I hope it will be of use to the Court.

6. For these reasons, the motion by Prisoners' Legal Services, et al. to file a brief *amici curiae* should be granted.

ROBERT SELCOV
DAN GETMAN
DAVID C. LEVEN
Prisoners' Legal Services
of New York
2 Catharine Street
Poughkeepsie, New York 12601

Sworn to before me this
day of September, 1986.

Notary Public

APPENDIX A

(Seal)

ATTORNEY GENERAL OF MISSOURI
Jefferson City
65102

William L. Webster
Attorney General

P.O. Box 899
(314) 751-3321

August 27, 1986

Mr. Dan Getman
Staff Attorney
Prisoners Legal Service of New York
2 Catherine Street
Poughkeepsie, NY 12601

Re: Turner et al. v. Safley et al.,
Supreme Court No. 85-1384

Dear Mr. Getman:

I have received your request to file an amicus curiae brief in Turner v. Safley in support of plaintiff/appellees. I have consulted with my client and I am sorry to say that we will not agree to have you file an amicus brief in this case.

I am sorry. If I can be of any further assistance to you, please do not hesitate to contact me at 314-751-8788.

Sincerely,

WILLIAM L. WEBSTER
Attorney General

/s/ Henry T. Herschel
Assistant Attorney General

HTH:ds

cc: Service List

APPENDIX A, p. 2

BLACKWELL SANDERS MATHENY WEARY
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August 26, 1986

Mr. Dan Gettman
Staff Attorney
Prisoners' Legal Services of New York
Two Catharine Street
Poughkeepsie, New York 12603

Re: *Turner v. Safley*
No.: 85-1384
Our File: 5132

Dear Mr. Gettman:

This is to inform you that the Respondents in the above-referenced case hereby consent to the filing of an *amicus curiae* brief by the Prisoners' Legal Services of New York and the additional sponsors.

Very truly yours,

/s/ Floyd R. Finch, Jr.
Cecelia G. Baty

FRF, Jr./rmg

cc: William L. Webster
Henry T. Herschel

No. 85-1384

In The

Supreme Court of the United States

October Term, 1986

—o—

WILLIAM R. TURNER; CATHY CROCKER; EARL ENGELBRECHT; BETTY BOWEN; BERNICE E. TRICKEY; HOWARD WILKINS; JANE PURKETT; WILLIAM F. YEAGER; LARRY TRICKEY, Employees of the Department of Corrections and Human Resources for the State of Missouri,

Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,

Respondents.

DR. LEE ROY BLACK; W. DAVID BLACKWELL; DONALD WYRICK; BETTY BOWEN; EARL ENGELBRECHT, Employees of the Department of Corrections and Human Resources for the State of Missouri,

Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,

Respondents.

—o—

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

—o—

BRIEF AMICI CURIAE OF PRISONERS' LEGAL SERVICES OF NEW YORK, INC., PRISON FAMILIES OF NEW YORK, JEROME N. FRANK LEGAL SERVICES ORGANIZATION (CONNECTICUT), AND CITIZENS UNITED FOR REHABILITATION OF ERRANTS (WASHINGTON, D.C.)

—o—

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE

This brief is filed on behalf of Prisoners' Legal Services of New York, Inc., Prison Families of New York, Jerome N. Frank Legal Services Organization (Connecticut), and Citizens United for Rehabilitation of Errants (Washington, D.C.) upon motion as provided by Supreme Court Rule 36.3.

Each of the organizations listed above are committed to protecting the rights of the incarcerated women and men throughout the United States. *Amici* share the deep conviction that prisoners should be permitted to avail themselves of the sacred right of marriage and should be able to correspond with each other when doing so is not a threat to penological goals. A full description and statement of interest of each *amicus* is set forth at the back of this brief as Appendix A.

o

SUMMARY OF ARGUMENT

This Court has declared that marriage is a fundamental right "for all individuals." In this case the defendants concede that marriage is a fundamental right for prisoners too. Many other courts, though, have relied on this Court's summary affirmance in *Butler v. Wilson* for the proposition that prisoners do not have a fundamental right to marry. Although *Butler* has been implicitly overruled by a later decision of this Court, to clarify the ambiguity created by *Butler, amici* argue that *Butler* should be explicitly overruled.

Since marriage is fundamental for prisoners, courts must apply heightened scrutiny to any restriction significantly limiting its exercise. Under heightened scrutiny, defendants' policy and practice are flagrantly unconstitutional.

Defendants' primary justification for restricting prisoner marriages is to protect women prisoners from making mistakes in their love-lives. The District Court below termed this purpose "excessively paternalistic." All penological literature points to the key role marriage plays in the rehabilitation of prisoners and their success on parole.

The severe restrictions that defendants have placed on prisoners' ability to correspond with other prisoners must be evaluated under a standard that closely scrutinizes the justifications for the policy. For two confined individuals, written correspondence represents their only lawful means of communication. Prior decisions of this Court do not require that review of such a core First Amendment freedom be limited to determining whether it rationally advances any state interest.

The Circuit Courts of Appeals have continued to subject prison regulations that impinge upon First Amendment rights to meaningful judicial review. Many cases demonstrate that prison officials can present minimally rational justifications for limiting prisoners' rights, but that there would be no burden on institutional objectives if their policies were amended to accommodate those rights. Thus, a more demanding standard of review must be used to evaluate regulations that infringe on prisoners' constitutional rights, especially those protected by the explicit terms of the First Amendment.

ARGUMENT

POINT I

PRISONERS HAVE A FUNDAMENTAL RIGHT TO MARRY.

In *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978), this Court declared that marriage was a fundamental right for all individuals. Defendants in this case concede that prisoners too have a fundamental right to marry. *Amici* agree. *Amici* urge this Court to find that *Butler v. Wilson,* 415 U.S. 953 (1974) is inconsistent with *Zablocki* and therefore should be overruled.

In *Butler v. Wilson,* this Court summarily affirmed the judgment of a three judge district court which held that life-term prisoners in New York had no fundamental right to marry. *Johnson v. Rockefeller,* 365 F. Supp. 377 (S.D.N.Y. 1973). The District Court reasoned that lifers in New York could not cohabit, have sexual intercourse, or beget children with their intended spouses and so marriage was a mere formal ceremony.*

This overly restrictive view of the interest prisoners have in marriage has been severely criticized. *See Lockert v. Faulkner,* 574 F. Supp. 606 (D.In. 1983) ("Marriage is

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* The opportunity to cohabit, have intercourse, and raise children is often not foreclosed in prison. As of 1982, seven states permitted conjugal visitation for prisoners. *See* Ann Goetting, "Conjugal Association in Prison: A World View" 14 *Criminal Justice Abstracts* 406 (September 1982). The majority of states make furloughs available to prisoners, *see* Carson Markley "Furlough Programs and Conjugal Visiting in Adult Correctional Institutions" 37 *Federal Probation* 19 (March 1973) (29 correctional departments in 1973). Many imprisoned parents maintain direct and active parental roles through visitation and correspondence as well.

infinitely more than the sharing of a single roof and bed. . ." at 609) "[T]he non-tangible devotion of [husband] and wife is certainly of equal—many would say higher—value. By barring . . . marriage, the state deprives [the prisoner] and his wife-to-be of the critical emotional support to be found in the formalized and symbolic relationship itself. The State prevents them from committing themselves to each other." *Johnson v. Rockefeller* 365 F. Supp. 377, 382 (S.D.N.Y. 1973) (Lasker, concurrence and dissent). The Court below noted that *Johnson* "ignores the elements of emotional support and public acknowledgement and committment which are central to the marital relationship." *Safley v. Turner,* 777 F.2d 1307, 1314 (8th Cir. 1985). Prisoners also may wish to marry to legitimate children. *See* Finding of Fact, No. 20 by the District Court below, *Safley v. Turner,* 586 F. Supp. 589, 592 (D.Mo. 1984).

This Court has repeatedly downplayed the significance of summary affirmances. "[S]ummary actions do not have the same authority in this Court as do decisions rendered after plenary consideration." *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 500 (1981). *See also Edelman v. Jordan,* 415 U.S. 651 (1974). "Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977). "They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion." *Metromedia, Inc., supra.* "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary

action." *Washington v. Yakima Indian Nation,* 439 U.S. 463, 477, n.20 (1979). This is particularly true when subsequent plenary decisions of the Court undercut a prior summary decision.

Four years after the summary affirmance in *Butler,* in *Zablocki v. Redhail, supra,* this Court implicitly overruled *Butler* and held that "the right to marry is of fundamental importance *for all individuals.*" 434 U.S. at 384 (emphasis added). While previous decisions had indicated that marriage was considered fundamental, *Loving v. Virginia,* 388 U.S. 1 (1967); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942), the holding in *Zablocki* was the first that applied fundamental rights analysis to a governmental restriction of the right to marry. The Court, in finding marriage fundamental, relied upon features of the marital relationship additional to those called lacking in Johnson.*

In *Zablocki,* this Court held that the due process right of privacy and equal protection clause invalidated a Wisconsin statute that required previously married persons under support obligations to obtain court permission in order to remarry. The Court held that:

> When a statutory classification significantly interferes with the exercise of a fundamental right, it can-

---

* Marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress. . . . It is an association that promotes a way of life, not causes, a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." (cites omitted) *Zablocki, supra,* 434 U.S. at 384.

> not be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.

434 U.S. at 388. Since marriage is fundamental, governmental restrictions on marriage are subjected to strict scrutiny.

Since *Zablocki,* the federal and state courts have generally, but not uniformly held that prisoners have a fundamental right to marry. For courts that have held marriage to be fundamental for prisoners, see *Bradbury v. Wainwright,* 718 F.2d 1538 (11th Cir. 1983); *Lockert v. Faulkner,* 574 F. Supp. 606 (D.In. 1983); *Salisbury v. List,* 501 F.Supp. 105 (D.Nev. 1980); *In re Carrafa,* 77 Cal. App. 3d 788, 143 Cal. Rptr. 848 (1978). Other courts have continued to rely on the summary affirmance of *Johnson v. Rockefeller, supra. See e.g. Hudson v. Rhodes,* 579 F.2d 46 (6th Cir. 1978) (per curiam) *cert. den.* 440 U.S. 919 (1979); *Wool v. Hogan,* 505 F. Supp. 928 (D.Vt. 1981); *Holden v. Dept. of Corrections,* 400 So. 2d 142 (Ct. App. Fla. 1981).

Although the defendants in this case concede that marriage is a fundamental right for prisoners (Petitioners' Brief, p. 30, para. 3) and do not rely on *Johnson,* this Court's implicit overruling of *Johnson* in *Zablocki* should be made explicit. *Zablocki v. Redhail, supra,* established the framework for analysis of a governmental restraint upon the fundamental right to marry. The District Court's decision in *Johnson v. Rockefeller* is inconsistent with *Zablocki* and should be overruled.

POINT II

HEIGHTENED SCRUTINY SHOULD BE GIVEN TO DEFENDANTS' RESTRICTION OF A PRISONER'S RIGHT TO MARRY.

Since defendants concede that prisoners have a fundamental right to marry, the next step in the Court's analysis must be to determine what level of judicial review to apply to restriction of that right. Defendants argue that although marriage is fundamental for prisoners, this Court should apply only a "rational relation" review (Petitioners' Brief, p.31). Defendants apparently claim that heightened scrutiny should never be applied to prison regulations. While this Court has never specifically decided what level of review to apply to a restriction of a prisoner's fundamental right, logic and past precedent urge that heightened scrutiny should apply. This Court has never subjected a restriction of a fundamental right to mere rationality review.

Defendants cite three Supreme Court cases for the proposition that lax scrutiny should apply to review prisoners' right to marry: *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1979); *Bell v. Wolfish,* 441 U.S. 520 (1979) and *Block v. Rutherford,* 468 U.S. 576 (1984). While relaxed scrutiny was applied in those particular cases, they do not stand for the proposition defendants assert, that heightened scrutiny should never apply to prison regulations.

In *Jones v. North Carolina Prisoners' Union,* this Court upheld a prison restriction on a prisoners' union's group meetings and inmate to inmate organizational solicitations, applying "rationality review". But the Court

chose this low level of review noting that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." 433 U.S. at 125. In other words, the nature of imprisonment must entail restrictions on certain rights. *Jones* held that prisoners' concerted group activities were *necessarily* incompatible with incarceration, 433 U.S. at 125-6, and so restrictions on prisoners' efforts to unionize were subjected only to rational relation review.

While a prisoners' labor union necessarily threatens institutional security, a prisoner's marital union does not. Marriage is not inconsistent with the fact of incarceration. Many prisoners are married when they enter prison and remain married through their term of imprisonment. Some of the typical prerogatives of the marital relationship may be limited by the mere fact of incarceration or only available to a lesser degree (e.g. cohabitation, conjugal visitation), but the marriage itself is not inherently inconsistent with incarceration.*

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* Permitting prisoners to marry does not require that prisons make the opportunity for conjugal visitation available. *See* Note "Prison Inmate Marriages: A Survey and a Proposal" 12 *U. Rich L. Rev.* 443 (Winter 1978) "It is uniformly held that consummation through sexual intercourse or cohabitation is not a requirement of a valid marriage ceremony." at 449. *See* numerous cases cited therein. Furthermore, the fact of marriage does not entitle the prisoner to any other additional rights. *See In re Carrafa, supra,* where the court struck down a Department of Corrections action prohibiting a marriage between an inmate and outsider. The court noted that marriage and visitation were quite distinct and that the Department was free to prohibit visitation completely, if appropriate, but could not prohibit the marriage.

Nor do *Bell v. Wolfish* and *Block v. Rutherford* stand for the proposition that lax review is required for all prison regulations. In *Bell,* this Court held that the constitution does not preclude double-bunking of pre-trial detainees. The Court noted:

> "We do not doubt that the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment . . . Nonetheless, that Clause provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement that are not alleged to infringe any other, more specific guarantee of the Constitution . . . And to the extent the court relied on the detainee's desire to be free from discomfort, it suffices to say that this desire simply does not rise to the level of those fundamental liberty interests delineated in cases such as *Roe v. Wade,* 410 U.S. 113 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972) [right to dispense contraceptives]; *Stanley v. Illinois,* 405 U.S. 645 (1972) [paternity interest of unwed fathers]; *Griswold v. Connecticut,* 381 U.S. 479 (1965) [fundamental privacy right to use of contraceptives]; *Meyer v. Nebraska,* 262 U.S. 390 (1923). (parallel cites omitted).

441 U.S. at 533-5. While the Court found no reason to apply a "compelling necessity" standard in a case where no specific constitutional guarantee was infringed, the Court implied that such a standard *should* apply in a case, such as the one at bar, where a recognized fundamental right is infringed.

Block v. Rutherford, 468 U.S. 576 (1984) goes no farther than *Bell v. Wolfish.* Where no specific constitutional right exists prison regulations are subjected only to rational relation review. 468 U.S. at —, 82 L.Ed.2d at 445-6. Furthermore, the standard of review applied by

the court in *Rutherford,* and upon which defendants rely, is the test to determine whether a condition of confinement constitutes illegal punishment of pretrial detainees in the absence of a demonstrable intent to punish. 82 L.Ed.2d at 445. The court indicated no intent to apply the same standard of review in the wholly different context of restriction of fundamental rights.

In *Zablocki v. Redhail, supra,* the Court held that when a governmental regulation "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." 434 U.S. at 388. No decision of this Court has held that when a governmental regulation restricts a prisoner's rights it automatically is given relaxed scrutiny.

In *Procunier v. Martinez,* 416 U.S. 396 (1974), this Court gave heightened scrutiny to restrictions on prisoner correspondence, noting:

> a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

416 U.S. at 405-6. This Court has never subjected restrictions on fundamental rights to mere rationality review as the defendants urge here.

The more logical approach would be to recognize that prisoners too may have fundamental rights which when unaffected by the simple fact of their incarceration may only

be restricted by regulation narrowly tailored to a sufficiently compelling state interest. There is no doubt that the state's interests in prison security and prisoner rehabilitation are strong interests.* And these interests in some circumstances may well be sufficiently important to outweigh the individual interest asserted. *See Lee v. Washington,* 390 U.S. 333, 334 (1968) (concurring opinion). Heightened scrutiny by this Court does not undermine the state's interest, but rather recognizes the powerful competing interests and gives the strict attention to detail that the proper balance between weighty interests deserves. The importance of the state's interest may in particular cases outweigh the competing individual interest, but it should not in and of itself change the standard of review.

POINT III

DEFENDANTS' INTEREST IN RESTRICTING PRISONER MARRIAGES DOES NOT OUTWEIGH PRISONERS' FUNDAMENTAL RIGHTS.

> "It is in protecting women inmates from 'gigolos' that Superintendent Turner hopes to better prepare them to function in the outside world. . . . As one of the defendants' experts testified, women inmates suffer from different types of problems compared to male inmates. Those different problems have contributed to the women inmates' criminal behavior. Too often they were overly dependent on males."

(Petitioners' Brief, pp. 34-5). The defendants' justification in this case is not merely absurd. It is offensive. The District Court found defendant Turner's attitude "exces-

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* Prisoners share these interests as well. See Point III, *infra,* for the notion that prisoner marriages advance the mutual interests of security and rehabilitation.

sively paternalistic'' 586 F. Supp. at 597. The paternalistic justification offered by defendants for their restriction of prisoners' rights to marry should not be countenanced by this Court. *See Frontiero v. Richardson,* 411 U.S. 677 (1973) and *Orr v. Orr,* 440 U.S. 268 (1979). The defendants' willingness to assert this gender discriminatory justification demonstrates anew the need for judicial review of prison administrative action. Under any level of review, this state interest cannot support restricting prisoners' right to marry.

Defendants' assertion that the regulation is justifiable in order to protect women prisoners from making mistakes in their love-lives is the only justification they have spelled out in detail. Defendants' tentative security justification is apparently supported by the hodge-podge of individual anecdotes—the analysis of which can only buttress the conclusion that ''defendants have no right to have the last word on a personal decision of this import.'' *Safley,* 586 F. Supp. at 594-5.

The defendants express concern over ''lovers' quarrels'' (Petitioners' Brief, p.36) and ''love triangles'' (Petitioners' Brief, p.39). These same complications will exist regardless of whether a prisoner is able to marry. While defendants must be implying that the ability to marry could further exacerbate these problems, they do not support this contention with evidence in the record. It seems more plausible that the opposite would result. The ability to marry might help ameliorate such quarrels.

Defendants' contention that rehabilitation demands that prisoner marriage be restricted is not only counter-intuitive, and based on paternalistic notions of the needs

of women prisoners, but it is belied by all social science data available. As discussed below, the literature on prison rehabilitation is full of praise for inmate marriages. There appears to be absolutely no support for the notion that restricting inmate marriages is beneficial. In a field noted for intractible disagreement, the uniformity of opinion on the positive effect of marriage is astounding.

There have been four empirical studies confirming the importance of marriage for an inmate's parole release success (the best and perhaps most important indicator of rehabilitation).* The first study was conducted by Lloyd Ohlin.** Ohlin found that while married inmates averaged only 3 or 4 visits per year from parents, friends and other relatives, they averaged 24 visits per year from their wives. Furthermore, ''. . . eighty percent of those who had lived in common-law relationships were not getting visits from their 'wives'.'' Building on these data Ohlin found that:

> 75% of the inmates classified as maintaining 'active family interest' while in prison were successful on parole while only 34% of those considered loners experienced parole success. . . . The value to society of maintaining strong prisoner-family relationships can be seen in all categorical measures. In every comparison category, including those with 3 or more prior commitments, men with more family-social ties have had the fewest parole failures.

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* Each of the studies cited below concerned male prisoners. *Amici* have not been able to find any studies concerning female prisoners.

** Ohlin, L. "The Stability and Validity of Parole Experience Tables." Ph.D. dissertation, University of Chicago, 1954, as reported in Homer "Inmate-Family Ties: Desirable but Difficult" 43 *Federal Probation* 47, 49 (March 1979).

Furthermore, active family interest proved to be the single best success predictor.

> Even the most highly regarded parole success indicators were not found to affect parole success as much as *having a family to go home to*. . . . Even 'having a job waiting' did not affect parole success as much as regular visits. [Emphasis added]

Similar findings were reported by Norman Holt and Donald Miller in their study "Explorations in Inmate-Family Relationships." They found a significant difference in the recidivism rate of prisoners who have had regular, continuing visits from family members.*

Burstein in his study *Conjugal Visits in Prison,* a study of 40 inmates in the Soledad Training Facility, also found a positive correlation between family involvement during incarceration and success on parole.** More recently, Daniel Glaser has noted, "[m]en whose first residence is with their wives have the fewest [parole] failures, and those living alone have the most." *The Effectiveness of a Prison and Parole System,* abr. ed. (Indianapolis: Bobbs-Merrill Co., 1969) at p. 249. These studies are

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* As reported in "Inmate-Family Ties: Desirable but Difficult" f.n. p. 13, *infra*.

** As reported in Goetting, Ann "Conjugal Association in Prison: Issues and Perspectives" 28 *Crime and Delinquency* 52 (Jan. 1982).

echoed time and again in less empirical works.* There are no dissenting voices.

There appear to be many reasons for the better performance of married convicts upon release, including the availability of community ties fostering stability in the inmate's personal life, the feeling of being needed by others leading to a sense of personal obligation, and the emotional support and assistance to help the inmate withstand the pressures of incarceration and transition following release. Ohlin notes that for the released married inmate:

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* Martin and Webster, *Social Consequence of Conviction* (London: Heinemann, 1971) note that: "It seems likely that the maintenance of a marital family is the most important single factor in helping a man to stay out of trouble on release, and therefore any practice that would encourage this would be desirable," at 89. The authors also point out that "the more deeply he is involved with wife, family and friends . . . the lower his chances of reconviction are likely to be." at 211. Benedict Alper states, "Many prisoners have no families, are not married, are 'lone sticks.' We cannot expect the prison to make up for such lack in a man's life. But if we dealt adequately with all those men who started out with good family situations, and helped to maintain them to the best of our ability, we would go far to prevent the recurrence of criminal careers." *Prisons Inside-Out: Alternatives in Correctional Reform* (Cambridge, Mass.: Ballinger Publ. Co., 1974). *See* Homer "Inmate-Family Ties: Desirable but Difficult" 43 *Federal Probation* 47, 49 (March 1979): "The convergence of these studies, the consensus of findings, should be emphasized. The strong positive relationship between strength of family social bonds and parole success has held up for more than fifty years, across very diverse offender populations and in different locales. It is doubtful if there is any other research finding in the field of corrections which can come close to this record." *See also* Hardwick "Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation" 60 *N.Y.U.L. Rev.* 275 (1985). "It is difficult to understand however, how the state interest in rehabilitating prisoners could be furthered by a ban on prisoner marriages." Note "Standard of Review in Prisoners' Rights Litigation and the Constitutional Right to Marry." 12 *U.S.F.L. Rev.* 465 (Spring 1978).

> His adjustment is made easier because he finds a clearly defined place for himself and a conventional role to play. The effect is to direct his activity along conventional lines and to offset feelings of being rejected, different, or set apart—as though he, an ex-convict, were on one side of an impassable barrier and the conventional person on the other. These beneficial effects are greatest in instances where the family has maintained an active interest and given much-needed support and encouragement to the offender during his imprisonment.

Selection for Parole: A Manual of Parole Prediction (New York: Russell Sage Foundation, 1951) p.49.

The defendants' justification for restricting prisoner marriages cannot withstand heightened scrutiny. The judgment of the Eighth Circuit Court of Appeals should be affirmed.

POINT IV

THE REGULATION LIMITING INMATE CORRESPONDENCE SHOULD BE SUBJECT TO HEIGHTENED SCRUTINY.

Amici urge this Court to closely scrutinize the necessity for the restrictions defendants have placed on inter-inmate correspondence. *Amici* will not address the application of this standard to the facts of this case, as they believe that plaintiffs' counsel is better situated to fully present the relevant facts to the Court.

In *Procunier v. Martinez,* 416 U.S. 396 (1974), this Court reviewed rules governing the censorship of prisoner correspondence. The Court evaluated these regulations under a standard of review that demanded close and meaningful scrutiny of the prison officials' asserted rationale for

the rules. It held that a restriction on correspondence must further one or more of the substantial governmental interests of security, order and rehabilitation and must be no more than is necessary or essential to protect that interest. The scrutiny required by *Martinez* should be applied in reviewing defendants' inmate-to-inmate correspondence rule.

Defendants argue that *Martinez* is not controlling because the Court based its decision on the rights of the prisoners' correspondents and not those of the prisoners themselves. However, the Court approached the issue in this manner so that it would not be necessary "to consider the extent to which an individual's right to free speech survives incarceration . . . " *Id.* at 408. The Court had not yet considered whether prisoners could claim any protection under the First Amendment, and it found it unnecessary to decide the question in *Martinez. Cf. Hudson v. Palmer,* 468 U.S. 519 (1984) (prisoners do not have any Fourth Amendment rights with respect to their prison cell).

Subsequent cases have held that prison regulations impinging on First Amendment freedoms of prisoners are subject to judicial review. *See Pell v. Procunier,* 419 U.S. 817 (1974); *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1977); *Bell v. Wolfish,* 441 U.S. 520 (1979). Contrary to defendants' assertion, these cases do not require that only a minimal standard of review be used in this case.

Pell recognized that a prisoner retains those First Amendment rights that are not inconsistent with his status or with the legitimate penological objectives of the correctional system. The Court upheld a ban on face-to-face

interviews between professional journalists and individual inmates, relying on the fact that alternative means of communication were permitted.

Three years later, in *Jones,* the Court reviewed three limitations on prisoners' First Amendment rights. They were: (1) a ban on bulk mailing; (2) a prohibition on inmate-to-inmate solicitation of membership in a labor union; and (3) a ban on all meetings of the union. Initially the Court noted that First Amendment speech rights were barely implicated by any of the restrictions under review. The advantages to the prisoners of bulk mailing were stated as cheaper rates and convenience, which do not fundamentally implicate *free speech* values. Also, the ban on bulk mailing did not extend to individual mailings, so there was not a total prohibition on communication of information about the union. The second regulation was found to be both reasonable and necessary in light of the fact that the prison officials were authorized to control organized union activity. Additionally, solicitation involved more than the simple expression of individual views; rather, it was advocation of legitimately prohibited activity and, therefore, could be restricted. Finally, the associational rights implicated in the prohibition on group meetings were found to be necessarily limited by the realities of confinement.

First Amendment rights of prisoners were once again considered in *Bell,* which involved a "publishers only" rule for inmates' receipt of hardbound books. As in *Jones,* the Court relied on the fact that the increased cost necessitated by the rule did not fundamentally implicate free speech values.

In these decisions, the Court did not limit *Martinez* as defendants argue. Significantly, in *Pell* the Court distinguished *Martinez* on the ground that no legitimate governmental interest to justify the correspondence restrictions had been found, while security concerns were obviously implicated by visitation. *Martinez* was not explained away by the *Pell* court as having relied on the rights of free persons. This approach is the more appropriate one to use in assessing the import of *Martinez.* The Court stated in *Martinez* that the legitimate needs of the institutions, particularly the need to maintain internal security, could, in some circumstances, justify a restrictive correspondence regulation. The Court also stated that prison officials must be allowed some latitude in anticipating the consequences of allowing certain speech in the prison environment. This analysis is similar to that later used in cases where inmates' rights were directly confronted. When deciding the constitutionality of prison regulations, the determining factors should be related to the legitimate needs of the prison system, and not whether the plaintiff is a prisoner or free person.

This is especially true in the context of the First Amendment speech values. Freedom of speech is a preferred freedom, one of the most highly valued in our society. *See Palko v. Connecticut,* 302 U.S. 319, 326-327 (1937). A rule limiting such a fundamental right should not be permitted to stand when it is clear from the record that the rule is overbroad or of limited value, even if it does appear to be rationally related to some state interest.

In light of the preferred nature of First Amendment rights, the federal courts have been understandably reluctant to abdicate their role as protector of the constitution

and to allow a rule of deference to effectively become one of no meaningful review. In addition to the Eighth Circuit's decision in this case, both the Second and Third Circuits have recently given stricter scrutiny to prison regulations that curtail fundamental First Amendment freedoms.

The Second Circuit addressed this question in *Abdul Wali v. Coughlin,* 754 F.2d 1015 (2d Cir. 1985). The case involved a ban on inmates' receipt of a report written by Prisoners' Legal Services concerning conditions at the Attica Correctional Facility. The prison authorities argued that a security problem would be created if inmates read this report, primarily because the authorities believed that the report was not accurate. The administration took issue with allegations of racism and brutality on the part of prison guards. It censored this report in spite of the fact that similar reports had been previously permitted into the prisons. Also, the report had been widely covered in the press, and these articles had been allowed into the prisons.

The Second Circuit undertook an extensive analysis of this Court's precedents. The court concluded that it was appropriate to closely evaluate the legitimacy of the state's asserted justification for its action. In doing this, the court specifically relied on the facts that the intended speech was being totally censored, without any alternatives being permitted and that a prisoner's reading of a report about prison conditions was not inconsistent with his status as a prisoner. The court also noted that logic did not compel the conclusion that inmates' reading of the report would create security problems in the prisons.

The Third Circuit discussed the issue in *Shabazz v. O'Lone,* 782 F.2d 416 (3d Cir. 1986) (*en banc*), *cert. filed,*

which considered the constitutionality of a prison regulation that prohibited minimum security Muslim inmates from attending weekly religious services held at noon on Fridays. The prison authorities justified their policy on the grounds that overcrowding necessitated that minimum security prisoners be assigned to work assignments outside the prison and that security demands militated against allowing prisoners to return to the facility during the day because of the burden of accounting for and supervising inmates.

In *Shabazz,* the court overruled in part its previous decision of *St. Claire v. Cuyler,* 634 F.2d 109 (3d Cir. 1980), because the court found that the standard of review used in *St. Claire* gave inadequate protection to prisoners' free exercise rights. It criticized the prior standard because it did not require the state to establish that its security concerns were genuine and were based upon more than speculation. Also, *St. Claire* had not required that there be an accommodation between institutional objectives, including those related to security, and the rights of prisoners. The court remanded the case so that the challenged policy could be evaluated under a more demanding standard of review. The state was required to prove that the challenged regulations were intended to serve and do serve the important penological goal of security, and that no reasonable method exists by which the prisoners' religious rights can be accommodated without creating bona fide security problems.

The Circuit Courts have correctly held that this Court's precedents do not require federal courts to blindly defer to prison officials' views of their security needs. It would be an unimaginative prison administration or state's attorney that could not think of some credible security ra-

tionale for almost any prison regulation. Thus, the Seventh Circuit has written, "We do not read anything in *Wolfish* as requiring this court to grant automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline." *Lock v. Jenkins,* 641 F.2d 488, 498 (7th Cir. 1981). Similarly, the Sixth Circuit wrote in *Weaver v. Jago,* 675 F.2d 116, 119 (6th Cir. 1982), "The state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or safety in order to establish that its interests are of the 'highest order' ".

Prisoners' Legal Services' experience in New York demonstrates that courts must not abandon their duty to enforce the constitutional rights of prisoners and that a more exacting standard of review must be required. Several cases have been litigated in New York over the past several years where prison officials have asserted security and other rationales for limiting inmates' rights where it is clear either that accommodation could have been made or that the justifications were extremely speculative or specious.

Among these cases is *Matter of Rivera v. Smith,* 63 N.Y.2d 501 (1984), where a Muslim prisoner challenged a rule that required him to be pat frisked by a correction officer of the opposite sex, an action which violated his religious beliefs. The prison authorities argued that their rule was justified by the security needs of the facility and their obligation to preserve female officers' equal employment opportunities. The security need that was asserted was the avoidance of delay required to respond to a Muslim's objection. The Court invalidated the rule as applied, under the state's constitution and statutes. It found that

the prisoners' rights should be accommodated under the circumstances. The specific pat frisk being challenged occurred in a non-emergency situation, and there were male officers present who could have conducted the search. Other prisoners were being frisked at the same time, and the female officer could have searched them. Clearly, the Muslim's religious freedom could be preserved without compromising either of the state's interests, and the court properly invalidated the authorities' overstated and unthinking justifications.

Several cases have been filed in both federal and state courts in New York challenging a rule that prohibits demonstrative prayer in outside yards. These cases have been brought by Muslim inmates who are required by their religion to perform salat five times each day, at designated times based on the sun's position in the sky. If required to pray in their cells during the short days of winter they totally lose the opportunity to participate in outdoor activity. Prison officials have argued that some inmates may be antagonized simply by observing Muslim inmates praying. Additionally, they justify their policy as a way to minimize inmate conflict, which they claim may occur if one inmate's recreation activity interrupts another's prayer.

Decisions in two of these cases have been reported. In *Matter of Abdullah v. Smith,* 115 Misc. 2d 105 (Sup. Ct. Wyoming Co. 1982), *affd.,* 96 A.D.2d 742 (4th Dept. 1983), the lower court ordered that Muslim inmates at Attica Correctional Facility either be permitted to pray in the yard or be allowed access to another area to pray and then be admitted to the yard. By the time the appeal was heard, a new policy had been adopted in conformance with the

judgment. The court found that there had not been any interference with the prison's security and order as a result of the new policy, and therefore it affirmed the judgment.

The second reported case on this issue, *Aziz v. LeFevre,* 642 F.2d 1109 (2d Cir. 1981), was filed by Muslims at Clinton Correctional Facility. The Second Circuit reversed the District Court's granting of summary judgment for the defendants and remanded the case. In doing so, it stated its view that only the slightest accommodation to the prisoners' needs was necessary to resolve the dispute and that it was difficult to understand how no other arrangement could meet the asserted security need. The correctness of this view was demonstrated one year later at Attica, as a result of the *Abdullah* decision, when an alternative policy was implemented with no adverse consequences. Also, since the remand in *Aziz,* the no prayer rule has not been enforced in the yard at Clinton, and inmates have been praying there without any adverse consequences.*

It is interesting to note the history of New York's Department of Correctional Services' policy on the prayer issue. In the early 1960's, when Muslim groups were seek-

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* Prisoners' Legal Services of New York is counsel for the plaintiffs in *Aziz.*

Another case has been filed on this issue: *Majid, et al. v. Henderson, et al.,* 75 Civ. 341 (N.D.N.Y.), a case out of Auburn Correctional Facility. Prisoners' Legal Services is also counsel in this case. *Majid* was recently settled. The prison officials agreed to allow prayer in an area near the yard, which could be used without requiring that all yard time be forfeited. They also offered to allow prayer in one designated portion of the yard, but the inmates chose the other option.

ing to receive formal status as religions, the prisoners argued that they were forced to hold all religious services in the prison yard. The prison's Acting Warden replied that the inmates were not forced to hold services in the yard, that those who did so acted voluntarily and were not interfered with by prison officials. *See Matter of Brown v. McGinnis,* 10 N.Y.2d 531 (1962). The complete turnaround in official policy twenty years later is remarkable. It also highlights the fact that no evidence of actual disruption in the yard as a result of prayer was presented in the recent cases, although prayer was admittedly permitted in the past. This surely proves that the speculative security concerns asserted by the prison administration should not be accepted by the courts as grounds for limiting prisoners' free exercise rights.

A case from New York challenging correspondence rules also demonstrates *Amici's* point. In *Milburn v. McNiff,* 108 A.D.2d 860 (2d Dept. 1985), a rule requiring that mail to the media be submitted unsealed was challenged. All personal correspondence other than business mail and all privileged correspondence could be sealed by the prisoners. The prison authorities argued that media mail could be used to circumvent other correspondence regulations if it was allowed to be submitted sealed. The court found this rationale to be completely unpersuasive, because it could not accept that a prisoner would use mail addressed to the media for such a purpose instead of his personal correspondence.

One final case from New York clearly shows the need for a stricter test than mere rationality when fundamental First Amendment rights are implicated. In *Matter of*

Shahid v. Coughlin, 83 A.D.2d 8 (3d Dept. 1981), *affd.*, 56 N.Y.2d 987 (1982), Muslim prisoners challenged a rule that prohibited them from using any covering when they were forced to use communal showers. This rule required that they violate their religious principles, which require strict modesty. By the time the case was decided, the rule had been changed to allow them to cover themselves with a clean towel. In spite of this simple solution, which accommodated both the prisoners' and the prison's needs, the court upheld the constitutionality of the original rule, using a test of rationality. Obviously, the rule would have been invalidated had any higher standard of review been used.

Amici believe that these cases demonstrate that a simple rationality test is woefully inadequate to protect fundamental rights from unnecessary infringement. Applying a higher standard of review in this case is fully consistent with the court's relevant precedents. Heightened scrutiny should be used to review defendants' correspondence rule.

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CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Dated: Poughkeepsie, New York
September 8, 1986

Respectfully submitted,

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APPENDIX A

STATEMENTS OF INTEREST OF INDIVIDUAL ORGANIZATIONS *AMICI CURIAE*

Prisoners' Legal Services of New York, Inc. is a six-office, non-profit, public interest law firm which provides legal representation to indigent prisoners incarcerated in prisons throughout the State of New York. PLS advocates represent state inmates on civil matters, primarily relating to the conditions of their confinement.

Prison Families of New York (formerly the Prisoner Family Project) provides information, advocacy and support to families of prisoners in state, federal and local institutions in New York. The program is administered by prisoner family members and ex-offenders.

The Jerome N. Frank Legal Services Organization (LSO) is the clinical legal education program of the Yale Law School. LSO coordinates state legal assistance programs under faculty supervision for individuals who cannot obtain or afford quality legal services. Among the populations which are served are state and federal prisons throughout Connecticut. Since its founding in 1970, LSO's primary assistance projects have counseled almost 5,000 state and federal prisoners. LSO has participated as appellate counsel in cases before the First, Second, and District of Columbia Circuits as well as before the Supreme Court of the United States. LSO has also appeared as an *Amicus Curiae* in the Supreme Court of the United States and in several circuits.

Citizens United for Rehabilitation of Errants (CURE) is a national organization with the purpose of reducing crime through reform of the criminal justice system. Among CURE's goals are the enhancement of prisoner-family relationships and the enforcement of constitutional conditions of confinement.

No. 85-1384

(9)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM R. TURNER, ET AL., PETITIONERS,

V.

LEONARD SAFLEY, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Motion for Leave to File Brief and Brief Amicus Curiae in Support of Respondents Submitted by the Plaintiff Inmates in GUAJARDO V. McCOTTER

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QUESTION PRESENTED

Whether a Missouri prison regulation which prohibits correspondence between inmates who are not members of an immediate family violates the constitutional rights of the inmates.

TABLE OF CONTENTS

No. 85-1384

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WILLIAM R. TURNER, ET AL., PETITIONERS,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Guadalupe Guajardo, Jr., A. L. Lamar, Thomas E. Hill, James E. Baker, Lawrence Pope, and Ronald Kent Franks, class representatives of inmates of the Texas Department of Corrections in *Guajardo v. McCotter*, No. 71-H-570 (S.D. Tex. July 1, 1986) (the "*Guajardo* plaintiffs") hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondents has been obtained. The consent of the attorney for the petitioner was requested but refused. (*See* Appendix.)

The interest of the *Guajardo* plaintiffs in this case arises from the fact that they have been parties to litigation involving inmate correspondence rights in Texas for more than fourteen years. Plaintiffs currently are permitted to correspond with inmates at other prison institutions as a result of two settlement agreements in *Guajardo*.

The State of Texas has filed an *amicus* brief in this case in which it now states that inmate-to-inmate correspondence may be prohibited. It also lodged with this Court parts of the *Guajardo* record purportedly to "illuminate the facts that should inform the Court's legal conclusions" in this case. The record Texas presented is both partial and distorted. The *Guajardo* plaintiffs believe that its *amicus curiae* brief contains a more complete statement of the facts in *Guajardo*.

Wherefore the *Guajardo* plaintiffs respectfully request that they be granted leave to file their Brief Amicus Curiae in Support of Respondents attached hereto.

Respectfully submitted,

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TABLE OF AUTHORITIES

No. 85-1384

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS SUBMITTED BY THE PLAINTIFF INMATES IN GUAJARDO v. McCOTTER

INTEREST OF AMICI

Pursuant to Supreme Court Rule 36, Guadalupe Guajardo, Jr., A. L. Lamar, Thomas E. Hill, James E. Baker, Lawrence Pope, and Ronald Kent Franks, class representatives of the inmates of the Texas Department of Corrections in *Guajardo v. McCotter*, No. 71-H-570 (S.D. Tex. July 1, 1986) (final judgment and order approving settlement) ("*Guajardo IV*"), by and through their attorneys, file this brief as *amici curiae* in support of respondents with respect to the correspondence

issue. The *Guajardo* plaintiffs have litigated various issues of inmate correspondence rights, including the right to inmate-to-inmate correspondence, in the Texas Department of Corrections ("TDC") for more than fourteen years. Should this Court retreat from the principles of *Procunier v. Martinez*, 416 U.S. 396 (1974) ("*Martinez*"), there could be serious ramifications for the correspondence rights won in the TDC.

Plaintiffs currently are permitted to correspond with inmates at other prison institutions as a result of two settlements in *Guajardo*. In 1983, the TDC agreed to the issuance of an injunction requiring that, among other things, inmate-to-inmate correspondence be permitted subject to the same, rather extensive, censorship conducted on outside correspondence.[1/]

In October 1985, just over two years after the 1983 settlement had been approved, TDC's director filed a Rule 60(b) motion to modify the correspondence rules, seeking to

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1/ The class first settled in *Guajardo v. Estelle*, 568 F. Supp. 1354 (S.D. Tex. 1983), *aff'd mem. sub. nom. Franks v. Procunier*, No. 83-2508 (CA5 July 27, 1984) ("*Guajardo III*"), after twelve years of litigation and over three years of monitoring by an independent consultant. Pursuant to the settlement agreement, the TDC adopted and implemented a new set of correspondence rules. The new rules provided for correspondence between prisoners but permitted a restriction on such correspondence where correspondence rights were abused.

See also *Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972), *vacated and remanded sub nom. Sands v. Wainwright*, 491 F.2d 417 (CA5 1973), *cert. denied*, 416 U.S. 992 (1974) ("*Guajardo I*"); *Guajardo v. Estelle*, 432 F. Supp. 1373 (S.D. Tex. 1977) (on remand), *modified*, 580 F.2d 748 (CA5 1978) ("*Guajardo II*").

restrict inmate-to-inmate correspondence drastically.[2/] Again, TDC compromised, deciding that it should accept inmate-to-inmate correspondence unless the inmate is found guilty of a serious violation of the correspondence rules. *See Guajardo IV*.

Now, as indicated in its *amicus* brief, the State of Texas states that it believes the prohibition of such correspondence is justified in spite of its series of decisions to allow the correspondence in its own system. It has filed with this Court its "Texas Lodging" and mischaracterized its own decisions, the record in *Guajardo*, and the Texas system, in an ostensible attempt to "inform" this Court's conclusions. Amicus Brief of State of Texas at 2 n.1 ("Texas Brief"). The *Guajardo* plaintiffs wish to respond to Texas' brief and lodging.

SUMMARY OF ARGUMENT

A ban on inmate-to-inmate correspondence must be justified by a substantial governmental interest and a showing that the means chosen to effectuate the state's purposes are no broader than necessary to protect the state's interest. The right to correspond with other inmates is not inconsistent with an inmate's status as a prisoner, and correspondence is not by nature inherently dangerous, even in the prison context.

State prison officials cannot meet the strict scrutiny standard because there is no credible evidence that inmate correspondence poses a real threat to prison security. The

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2/ A copy of portions of the transcript of the hearing on that motion along with some of the deposition testimony and exhibits introduced into evidence, has been lodged with the Clerk of the Court. Citations to this lodging are noted as ("L. at _____."). The *Guajardo* plaintiffs offer this lodging in response to the Brief for the State of Texas as Amicus Curiae and the Lodging by the State of Texas.

current move to restrict inmate correspondence rights stems more from the desire to make communication with disfavored groups difficult and an aversion to reviewing inmate mail than from the need to control prison gangs.

ARGUMENT

I. TO RESTRICT INMATE-TO-INMATE CORRESPONDENCE, PRISON OFFICIALS MUST SHOW THAT THE RESTRICTION WILL FURTHER A SUBSTANTIAL GOVERNMENTAL INTEREST AND IS NO BROADER THAN NECESSARY TO PROTECT THAT INTEREST.

"There is no curtain drawn between the Constitution and the prisons of this Country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). Prison inmates retain those First Amendment rights that are not inconsistent with their status as prisoners or with legitimate penological goals of the corrections system. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("*Pell*"). Thus, a restriction on prisoners' right to correspond with other prisoners must be justified by a substantial governmental interest and a showing that the means chosen to effectuate the state's purposes are no broader than necessary to protect that interest. *Martinez*, 416 U.S. at 423. These principles have governed the courts' review of inmate mail censorship since they were enunciated by this Court in 1974. These settled principles, which have governed significant numbers of prison cases, such as *Guajardo*,[3/] should not be abandoned now.

3/ A number of lower courts have applied the *Martinez* test to restraints on inmate correspondence that did not involve the rights of free persons. *See Safley v. Turner*, 777 F.2d 1307 (CA8 1985) (standard not met); *Daigre v. Maggio*, 719 F.2d 1310 (CA5 1983) (*Martinez* satisfied); *Storseth v. Spellman*, 654 F.2d 1349 (CA9 1981) (restriction broader than necessary); *Watts v. Brewer*, 588 F.2d 646 (CA8 1978) (general statement that *Martinez* would apply); *Schlobohm v. U.S. Attorney General*, 479 F. Supp. 401 (M.D. Pa. 1979) (*Martinez* test satisfied); *Davis v. Balson*, 461 F. Supp. 842 (N.D. Ohio 1978)

(Footnote Continued)

Recent opinions by this Court on the rights of state prison inmates have not departed from this precedent to establish a dual standard for First Amendment rights, with one for inmates and the other for free persons. Thus, the choice between application of the reasonableness test and the strict scrutiny standard does not turn on the identity of the person claiming the First Amendment right.

In *Pell v. Procunier*, decided only a few months after *Martinez*, this Court applied the same analysis to inmates and journalists. Had the Court intended to adopt different standards for inmates and free persons, the dual standard would have been revealed in *Pell*. The Court's application of the reasonableness standard in *Pell* was based on its characterization of the restriction as a time, place, and manner regulation that was content neutral.

In *Jones v. North Carolina Prisoners Labor Union, Inc.*, 433 U.S. 119, 130 (1977) ("*Jones*"), "First Amendment speech rights [were] barely implicated." Moreover, the activity in which the prisoners sought to engage, solicitation for a prisoners union, was one that was "presumptively dangerous." *Id.* at 133. The Court emphasized that the restriction was narrowly tailored to meet the difficulties posed by the union.

(Footnote Continued)

(regulation more onerous than necessary); *Mayberry v. Robinson*, 427 F. Supp. 297 (M.D. Pa. 1977) (upheld regulation); *Peterson v. Davis*, 415 F. Supp. 198 (E.D. Va. 1976) (upheld prior approval requirement); *Farmer v. Loving*, 392 F. Supp. 27 (W.D. Va. 1975) (ban too broad); *Williams v. Ward*, 404 F. Supp. 170 (S.D.N.Y. 1975) (ban satisfied *Martinez*); *Mitchell v. Carlson*, 404 F. Supp. 1220 (D. Kan. 1975) (*Martinez* applied to censorship of inmate-to-inmate mail).

In applying a reasonableness standard in *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court stressed three points. First, the regulation that prohibited receipt of hard-bound books by pre-trial detainees from any source other than a publisher, a bookclub, or a bookstore, was content neutral and a time, place, and manner restriction. *Id.* at 551-52. Second, since the inmates could receive softcover books and magazines, or use the jail's library, there were alternative means of communication. *Id.* at 552. Third, the restriction worked only a limited deprivation since the pre-trial detainees would be subject to it for a very short period of time. *Id.*

This Court's holding in *Block v. Rutherford*, 468 U.S. 576 (1984), followed the reasoning of *Jones*. In determining that courts should defer to the professional judgment of prison officials, the Court regarded contact visits as a presumptively dangerous activity. Further, and more importantly, only the mode of communication and not its very existence was at issue.

As the Second Circuit recognized in *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (CA2 1985), a reading of those cases suggests a tripartite standard, drawn by reference to the nature of the right being asserted, the type of activity involved, and whether the challenged restriction works a total deprivation or serves merely as a time, place, and manner limitation on the exercise of that right.[4/]

4/ Of the four circuits that have looked at the First Amendment rights of prisoners, only the Fourth Circuit would subscribe to the reasonableness test where a complete ban on communication is involved. *Vester v. Rogers*, 795 F.2d 1179 (CA4 1986). The Second,

(Footnote Continued)

As the Circuit Court below recognized, the ban on inmate-to-inmate correspondence directly implicates First Amendment rights and cannot be characterized as merely a time, place, and manner restriction.[5/] It leaves no alternative means for communication between inmates. *Safley*, 777 F.2d at 1312. To extend the *Jones-Bell-Block* reasonableness standard to such a situation would require overruling *Martinez* and would mark a virtually complete withdrawal from judicial protection of First Amendment rights in a prison context.

To reaffirm that the *Martinez* standard applies is not to suggest that the courts may unduly interfere in prison administration or be insensitive to the difficult problems facing prison administrators. This Court counselled against these errors in *Martinez* itself. *Martinez* merely stands for the

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(Footnote Continued)

Ninth and Eighth Circuits would hold that such restrictions on inmate correspondence must pass "strict scrutiny." *See Safley v. Turner*, 777 F.2d 1307 (CA8 1985); *Abdul Wali v. Coughlin*, 754 F.2d 1015 (CA2 1985); *Storseth v. Spellman*, 654 F.2d 1349 (CA9 1981).

5/ Inmate-to-inmate correspondence can implicate the right of access to the courts. Absent alternatives, states must allow prisoners to receive assistance from inmate writ writers. *Johnson v. Avery*, 393 U.S. 483 (1969). While the time, place, and manner for rendering such assistance may be reasonably restricted, states cannot deny it altogether. 393 U.S. at 490. Within some state prison systems, such as TDC, inmate-to-inmate mail is very important to the process of giving and receiving inmate writ writer assistance and adequate alternatives to writ writer assistance do not exist. *Ruiz v. Estelle*, 503 F.Supp. at 1367. *See also Corpus v. Estelle*, 551 F.2d 68 (CA5 1977). Nevertheless, TDC often has sought to "severely inhibit communication among inmates about legal matters" and writ writers have been the inmates most frequently singled out for abusive treatment such as officially-induced stabbings, segregation, and unwarranted disciplinary actions. *Ruiz*, 503 F.Supp. at 1300, 1365, 1369 & 1372.

unassailable proposition that when First Amendment rights are clearly implicated by a prison restriction, as in this case, the courts will insist that the restriction be one that serves a legitimate penological goal and that is not overbroad. To require less is to return to unbridled stifling of peaceful dissent and harassment once prevalent in our prisons. *See Martinez*, 416 U.S. at 399-400 (prison officials censored letters that "unduly complain[ed]," "express[ed] inflammatory political, racial, religious or other views or beliefs," or were "otherwise inappropriate"); *Guajardo III*, 580 F.2d at 754, 760-61 (TDC had demonstrated a propensity toward blanket denials of permission to correspond when the would-be correspondent belonged to an "undesirable group," such as prison reform organizations, "left wing" groups, married women, former inmates, known homosexuals and inmates at other institutions; and to suppress material critical of prison administrators).

II. THE COURT SHOULD NOT BE MISLED BY THE STATE OF TEXAS' ATTEMPT TO INTERJECT A PARTIAL AND DISTORTED RECORD INTO THIS CASE.

In arguing for a reasonableness standard, Texas tries to convince the Court that an injustice has somehow been done in Texas due to the *Guajardo* Court's reliance on the *Martinez* test and that inmate-to-inmate correspondence has caused violence in the TDC. Neither is true.

A. Texas Has Repeatedly Belied Its Ostensible Concern with Inmate-to-Inmate Correspondence by Accepting the Obligation to Allow It.

The record Texas uses stems from a Rule 60(b) motion made by O. Lane McCotter, the current director of TDC, seeking to change a judgment entered in *Guajardo* in 1983 as a result of a voluntary settlement of constitutional challenges to

many of TDC's correspondence rules and practices. The 1983 settlement allowed inmate-to-inmate correspondence subject to TDC's right to read all correspondence and to reject objectionable letters. (In fact, inmate-to-inmate correspondence had been permitted in TDC for several years before 1983.) Mr. McCotter, who joined the system after the settlement had been concluded, disagreed with his predecessor's action and sought to virtually end inmate-to-inmate correspondence, alleging that it could not be effectively censored and therefore had led to violence. After extensive discovery and less than two days of the presentation of Mr. McCotter's case, the proceeding was settled by a minor change in the TDC rules to provide that inmate-to-inmate correspondence could be restricted if the inmate committed a serious violation of the correspondence rules. In short, Mr. McCotter, as had his predecessor, apparently decided that inmate-to-inmate correspondence could be adequately handled by screening.

Texas tries to avoid recognition of its choice by implying it was somehow forced to settle by the District Court or the *Martinez* standard or both. In fact, TDC and Mr. McCotter chose to settle freely and voluntarily, and indeed knew *certiorari* had been granted in this case at the time they did so.[6/] Had TDC truly felt that inmate-to-inmate

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6/ There is nothing in the *Guajardo* record to suggest that either of the two able trial judges who jointly presided over the hearing were hostile to TDC. (Because Mr. McCotter's motion also implicated a previous settlement in *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *modified*, 679 F.2d 1115 (CA5 1982), *cert. denied*, 460 U.S. 1042 (1983), an Eighth Amendment, conditions of confinement case, the motion was tried before both District Courts at Mr. McCotter's

(Footnote Continued)

correspondence posed as great a threat as it now claims, it surely never would have settled *Guajardo* and thereby compromised its central security concerns.

B. Texas' Presentation Distorts the Facts and Is Fundamentally Unreliable.

The record Texas presents in a fundamental sense is unreliable: It has never been subjected to full cross-examination and rebuttal and no fact finding has ever been made on it. Texas' rendition of "the facts" is thus both partial and distorted.

The *Guajardo* hearing was recessed, at TDC's request, after only one and a half days of testimony. As a result, plaintiffs never cross-examined the chief witness Texas now relies on to argue that inmate-to-inmate correspondence is dangerous, Salvador Buentello,[7] or put on their own case at all. Had the record been fully developed, it would show even more clearly that inmate violence within the Texas prison system is caused by inadequate and poorly trained staff, failure

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(Footnote Continued)

request.) Contrary to Texas' intimation that it became clear during the hearing that TDC would not get any relief from the District Court, portions of the transcript Texas omitted from its presentation show the Court may have been inclined to approve a restriction on mail between gang members. The *Guajardo* Court merely noted that in a Rule 60(b) motion, Mr. McCotter would have to demonstrate "changed circumstances" to obtain a modification of the agreement. It was not hostile to TDC's security concerns.

7/ Texas also lodges Mr. Buentello's deposition testimony about alleged correspondence abuses. That testimony was based entirely upon hearsay and was never tested or indeed admitted in open court. In fact, the incidents Mr. Buentello recounted are shown by TDC's own documents, admitted as plaintiffs' exhibits in *Guajardo*, to have been

(Footnote Continued)

to station guards in housing and recreation areas, a historic policy of ignoring gangs, old and unsafe facilities, and TDC negligence — not by inmate correspondence.

Although a violation of state law, up until 1981, TDC used inmate guards called "building tenders" to compensate for chronic shortages of security personnel. *Ruiz*, 503 F. Supp. at 1294 n.54. Building tenders were allowed to carry weapons and performed most security functions. They served as enforcers of the ranking officers' will and harassed, threatened and physically punished inmates perceived as troublemakers. *Id.* at 1295. The court characterized the building tender system as an abusive, brutal system and ordered its elimination. *Id.* at 1295-98.

When the system was not immediately replaced by a trained civilian guard force, violence escalated,[8] as the TDC had been warned that it would if TDC failed to hire and train a sufficient number of guards to replace building tenders:

(Footnote Continued)

caused by TDC's own unrelated negligence and not by correspondence. TDC's investigators attributed the Evans and Douglas murders to staff negligence. (L. at 2, 6). An independent court monitor in *Ruiz v. Estelle*, 503 F. Supp. 1265, concluded that the Robidoux attack evidenced a "clear lack of adequate supervision during recreation." Twenty-Eighth Monitor's Report of Factual Observations to the Special Master [for *Ruiz v. Estelle*] 67-68 n.78 (1985). (L. at 10). TDC's own report on the Jaquez murder shows that his assailants got the contract to kill him "from initially the streets," not through inmate-to-inmate correspondence. (L. at 11).

8/ S. Ekland-Olson, Judicial Decisions and the Social Order of Prison Violence: Evidence from the Post-Ruiz Years in Texas 23-24 (1985) (unpublished report commissioned by the TDC). (L. at 14-15).

> "Reportedly, Texas has thus far experienced only limited gang influence within its prisons. To whatever extent a "power vacuum" is permitted to exist within the prisons, gangs will probably assert their poisonous influence . . . . Maintaining the capacity to control and manage the prisoners will require numerous changes in operational practice, and perhaps in law . . . . If these things do not occur and prisoners realize they have nothing to fear and nothing to lose, TDC institutions will become unmanageable and very dangerous.[9/]

TDC failed to heed that warning. Until very recently, TDC had a "totally inadequate" system of inmate classification. *Ruiz*, 503 F. Supp. at 1282. Even after developing a classification plan, TDC did not fully implement it.[10/] TDC's staffing patterns have fallen short of minimum security requirements.[11/] TDC has failed to provide adequate supervision during recreation.[12/] It should not be surprising,

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9/ *Id.* at 24, *quoting* N. Benton & D. Stoughton, Remedial Actions to Reduce Unnecessary Use of Force in the Texas Department of Corrections 4 (1983) (filed as appendix B to Nineteenth Monitor's Report of Factual Observations to the Special Master [for *Ruiz v. Estalle*] (1984)) (L. at 15).

10/ As Mr. McCotter, then Deputy Director of Operations, reported on discovering violations of the classification system on a unit experiencing violence (a situation he called "a mess"): "This probably explains how our last stabbing occurred — and it's only a miracle we haven't had many others!" (L. at 17).

11/ TDC itself concluded that in November 1985, 19 of the 27 units still had staff shortages in housing areas (L. at 20-21), and as of January 1985, 10 of TDC's Units had *no* guards assigned to any housing areas. Report of the Special Master [for *Ruiz v. Estelle*] Concerning the Twenty-Fifth Monitor's Report 5 (1985). (L. at 23).

12/ Twenty-Eighth Monitor's Report of Factual Observations to the Special Master [for *Ruiz v. Estelle*] (1985). (L. at 10).

then, that the Texas prison system has experienced violence, for reasons having nothing to do with correspondence.[13/]

Texas distorts even the partial record by failing to mention significant portions. Most significantly, TDC's own paid expert, Dr. Sherman Day, found the TDC's proposed rule banning inmate-to-inmate correspondence an exaggerated response to the perceived danger. He saw no need to ban all inmate-to-inmate correspondence when all that was needed was some type of restriction on gang members' communication. In his view, the latter was sufficient to deal with TDC's security concerns.

The only recent national study to examine this problem found that inmate correspondence was not a significant factor in the spread of prison gangs and in the increase in prison violence.[14/] In fact, some states reported that inmate correspondence was a valuable intelligence gathering tool that enabled them to identify gang members.[15/] When asked what strategies they employed to combat gangs, no prison agency

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13/ TDC's rate of violence, at a time when it allowed inmate-to-inmate correspondence, was less than that of the Federal Bureau of Prisons, which banned such correspondence, until 1983, when the effects of ending the brutal building tender system were felt. S. Ekland-Olson, *supra* note 8 at 23-24. (L. at 14-15).

14/ G. Camp & C. Camp, Prison Gangs: Their Extent, Nature and Impact on Prisons (1985) (prepared under grant from the U.S. Dept. of Justice). The study includes data from Texas, as well as most other states.

15/ *Id.* at 70.

cited cutting off correspondence between inmates as a means of controlling gangs.[16/]

Louis M. Dentici, Chief of Internal Affairs of the California Department of Corrections and in charge of gang intelligence, testified by deposition that California's allowance of inmate-to-inmate correspondence without prior approval has not heightened the level of prison gang activity. (L. at 29). Similarly, TDC permitted inmate-to-inmate correspondence for approximately seven years with no complaint or public allegation that it caused any security problems.

Texas argues that inmate-to-inmate mail cannot be monitored effectively. Texas Brief at 11. Yet, TDC has never made even rudimentary efforts to deal responsibly with inmate-to-inmate correspondence. TDC, for example, does not provide any formal training to its mailroom staff on gangs and codes. (L. at 35). It has not developed any guidance materials on how to spot codes.[17/] Despite the fact that about

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16/ *Id.* at 65-66. Some agencies indicated that enforcement of mail regulations and intercepting communications were among the strategies they used.

17/ In arguing that inmate-to-inmate mail cannot be monitored, Texas relies heavily on the testimony of Robert Humphries, a TDC inmate in protective custody who admitted he was dependent on TDC's good graces for his very life. (Texas Lodging at 53.) Humphries admitted that the code he referred to had never been used in real life, but was concocted for the TDC's use. (Texas Lodging at 40). Humphries also admitted that the rules and guidelines of his former gang directed gang members to send important messages by hand delivery, not through the mail, presumably because of the risk of detection through mail censorship. (Texas Lodging at 76). In addition, Humphries testified that if TDC wanted to learn what codes were being used all it had to do was "just stand down in the cell block" and listen to the codes being called off by the inmates. (Texas Lodging at 65-66).

a third of its inmate population is Spanish-speaking, fourteen of its twenty-seven prison units had no Spanish-speaking mailroom staff as of December 1985. (L. at 38). Further, a 1985 survey of TDC unit mailrooms showed that TDC could review all inmate-to-inmate correspondence with a modest increase in civilian, or non-corrections officer, staff. (L. at 40).[18/]

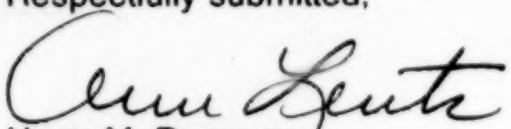
The entire record in *Guajardo* clearly suggests that a ban on inmate-to-inmate correspondence is at best a much exaggerated response to security concerns, as Texas evidently concluded when it decided that it should instead adopt a rule merely precluding such correspondence by inmates who had committed a serious violation of the mail rules. The *Guajardo* plaintiffs respectfully suggest that this Court should not be swayed by Texas' distorted lodging but by the indisputable fact of its actions.

18/ Its reliance on a two-week survey of inmate-to-inmate mail within TDC to show the volume of such correspondence is misplaced. First, it neglected to point out that the true volume of such correspondence is about one-half the total figure shown, since each piece was counted at both the sending and receiving units. (L. at 36-37). Second, the admittedly unscientific study encompassed Valentine's Day, with its increased mail volume. Third, fully 40 percent of the inmate-to-inmate correspondence within TDC is to and from the two women's units, where TDC admits there are no gangs and very little violence.

CONCLUSION

For all of the above reasons, this Court is respectfully requested to affirm the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,



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APPENDIX

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August 27, 1986

Ms. Ann Lents
Vincent & Elkins
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Houston, TX 77002-7660

Re: Turner et al. v. Safley, Supreme Court File 85-1384

Dear Ms. Lents:

I have received your request to write an amicus curiae brief in opposition to the brief filed by Texas. Frankly, I do not believe that the Supreme Court is an appropriate forum for you and your adversaries in the Attorney General's Office in Texas to litigate the truthfulness of a transcript. With that in mind, I will not consent to the filing of a brief in opposition to Texas' brief.

Sincerely,

WILLIAM L. WEBSTER
Attorney General

HENRY T. HERSCHEL
Assistant Attorney General

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cc: Service List

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AUG 25 1986

August 21, 1986

Ms. Ann Lents
Vinson & Elkins
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Re: Turner, et al. v. Safley, et al.
C.A.: 85-1387
Our File: 5132

Dear Ms. Lents:

This is to inform you that Respondents in the above-referenced case hereby consent to the filing of an amicus curiae brief in this case on behalf of the inmate class in Guajardo v. McCotter.

Very truly yours,

Floyd R. Finch, Jr.

Floyd R. Finch, Jr.

FRF,Jr./rmg

cc: William L. Webster
Henry T. Herschel

85-1384

No. 85-1304

IN THE

Supreme Court of the United States

October Term, 1986

WILLIAM TURNER, et al., and DR. LEROY BLACK, et al.,

Petitioners,

—v.—

LEONARD SAFLEY, et al., and MARY WEBB, et al., individually and as a class of similarly situated people,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF THE CORRECTIONAL ASSOCIATION OF NEW YORK, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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September 8, 1986

IN THE

Supreme Court of the United States

October Term, 1986

No. 85-1304

WILLIAM TURNER, et al., and DR. LEROY BLACK, et al.,

Petitioners,

—v.—

LEONARD SAFLEY, et al., and MARY WEBB, et al., individually and as a class of similarly situated people,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Correctional Association of New York (the "Correctional Association") moves pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States for leave to file a brief *amicus curiae* in support of respondents. The written consent of respondents has been filed with the Court. Although petitioners have advised the Correctional Association that they do not oppose this motion, they have not consented to the filing of this brief.

The Correctional Association is a private, nonprofit civic organization founded in 1844. It is vested with authority from the New York Legislature to visit prisons and to report to the Legislature its findings and recommendations concerning prison conditions and corrections policy. Act to Incorporate

the Prison Association of New York, ch. 163, 1846 N.Y. Laws 175 (*amended by* Act of June 5, 1973, Ch. 398, 1973 N.Y. Laws 757).

Since its formation, the Correctional Association has been a close observer of the jails and the prisons in New York State and has examined and reported on the effect of family ties, especially the marital relationship, on prison conditions and corrections policy. The Association is acutely interested in the issue of inmates' right to marry during incarceration because it believes, based on empirical studies and its own observation, that marriage has a positive effect on inmate morale and discipline during incarceration and reduces recidivism after release.

The Correctional Association has an interest in the Court's resolution in this case of the issues relating to the rules and practices of the Missouri Department of Corrections concerning inmate marriage during incarceration. In light of its legislative authority and responsibility to investigate prison issues and to report and make recommendations to the New York State Legislature concerning corrections policy, the Correctional Association believes it will present to the Court a valuable perspective on the issues in this case relating to inmate marriages.

Respectfully submitted,

/s/ JOHN H. HALL
John H. Hall

Dated: September 8, 1986
New York, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Regulations:

Legislative Reports:

Other Authorities:

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE CORRECTIONAL ASSOCIATION OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICUS CURIAE

A motion for leave to file this brief is being presented today on behalf of the Correctional Association of New York (the "Correctional Association") pursuant to Rule 36.3 of the Rules of this Court. The interests of the Correctional Association are set forth in its motion, which is bound with this brief pursuant to rule 36.3. The Correctional Association has appeared as an *amicus curiae* before this Court and before other courts in several previous cases relating to prison conditions and corrections policy.

The Correctional Association seeks to file this brief *amicus curiae* because it believes that the right to marry is a fundamental right that deserves full constitutional protection in a prison setting and that any substantial impairment of that right would undermine rather than advance important penological interests.

STATEMENT OF THE CASE

This case presents the question of whether the regulations and practices of the Missouri Department of Corrections with respect to marriages of prison inmates are consistent with the constitutional protection of the right to marry. Respondents challenged the regulations and practices of the Missouri Department of Corrections on the ground that they empower prison officials to determine the acceptibility of the prospective marriage partners and the merits of a marriage, and have effectively prevented the formation of a marital relationship during incarceration except to legitimize a child.[1]

The marriage regulation initially challenged by respondents set forth the procedure to be followed when an inmate requested permission to marry.[2] The regulation did not obligate prison officials to assist an inmate who wanted to get married, but it did not expressly authorize such officials to prohibit inmates from marrying. *Safley v. Turner*, 586 F. Supp. 589, 592 (W.D. Mo. 1984). After respondents commenced this litigation in 1983, the regulation was revised. The new regulation permitted an inmate to marry but only with the approval of the prison superintendent upon a convincing showing that there were compelling reasons therefor. *Id.* In practice under both regulations, petitioners denied inmates' requests to marry,

1 This case also involves a challenge to a regulation restricting inmate to inmate correspondence. We do not address that issue in this brief.

2 The regulations apply both to marriages between an inmate and non-prisoner and to marriages between inmates. Petitioners Brief at 40 (hereinafter designated as "Pet. Br.").

except when the prospective marriage partners had either conceived or had a child that would be illegitimate without the marriage. *Id.*

A class was certified by the district court including inmates and non-prisoners "who desire to . . . marry inmates of Missouri correctional institutions and whose rights of . . . marriage have been or will be violated by employees of the Missouri Division of Corrections." Pet. Br. at 3 n.1.

In support of the marriage regulations, petitioners contended at trial that prison officials have the inherent authority to regulate inmate marriages pursuant to their statutory authority to control the prison institution. Vol. I at 70, 168-69.[3] Petitioners further contended that since prison officials are responsible for rehabilitating inmates, they have the authority to bar marriages that they consider detrimental to inmate rehabilitation. Vol. I at 75-76, 180, 184; Vol. II at 66-67; Vol. IV at 199-200. In addition, petitioners contended that marriages between inmates pose the risk of escape and manipulation of inmates and that possible "love triangles" would generate violent confrontations between inmates. Vol. IV at 32-33, 231-233.[4]

On May 7, 1984, the district court held that the marriage regulations and practices constituted an unjustified denial of the right to marry. 586 F. Supp. at 594-95. Relying principally on *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Bradbury v. Wainwright*, 718 F.2d 1538 (11th Cir. 1983), the court concluded that each of the marriage regulations

> unconstitutionally infringes upon [respondent's] right to marriage because it is far more restrictive than is either reasonable or essential for the protection of any state

3 References to the transcript of trial are designated herein as "Vol. ___ at [page]."

4 Petitioners continue to advance these justifications before the Court. See Pet. Br. at 13, 31-34.

security interest, or any other legitimate interest, such as rehabilitation of inmates.

586 F. Supp. at 594. The district court ordered the parties to submit jointly proposed regulations in accordance with its decision. Resp. Br. at 3.[5] The district court approved the proposed regulations, and petitioners adopted them. *Id.* The court-approved marriage regulation permits any inmate to marry. *Id.*

On November 19, 1985, the Eighth Circuit unanimously affirmed. 777 F.2d 1307 (8th Cir. 1985). It held that inmates have ~~a~~ fundamental right to marry and rejected petitioners' contention that a prisoner has no right to have a marriage ceremony performed. *Id.* at 1313. The court held further that, in light of the fundamental nature of the right to marry and the fact that the regulations on their face and as applied deprived inmates of the right to marry, the district court properly analyzed the constitutionality of the regulations under the heightened scrutiny standard of *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974). 777 F.2d at 1314. The court of appeals also affirmed the conclusions of the district court that the regulations were not the least restrictive means of achieving the legitimate penological objectives asserted by petitioners. *Id.* at 1315.

5 References to the Brief for Respondents are designated herein as "Resp. Br.".

SUMMARY OF ARGUMENT

As this Court expressly recognized in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the right to marry is an aspect of the fundamental right to privacy protected under the due process clause of the United States Constitution. A person's right to marry maintains its status as a fundamental right during incarceration even though confinement necessarily limits or prevents participation in certain associational and intimate aspects of a marital relationship.

The regulations and practices challenged by respondents empower prison officials to make the overriding determination on the suitability of marriage partners and the merits of a marriage before any inmate can be married. Petitioners claim a right to such unfettered intrusion into the highly personal marriage decisions of adults in their custody based on their erroneous view that marriage is detrimental to prison goals and inconsistent with confinement. To the contrary, marriage has been demonstrated to be a highly positive influence in the prison environment. In addition, an individual's status as a prisoner and as a married person are not inconsistent although certain incidents of marriage are necessarily limited by confinement. In this respect, marriage is highly distinguishable from those rights—such as association and privacy in prison cells—which are amenable to a deferential standard of review.

Because marriage is inconsistent with neither penological goals nor confinement, restrictions on the right to marry in prison are unjustified unless incidental to the pursuit of legitimate penological objectives. Under such circumstances, the heightened standard of review established by the Court in *Procunier v. Martinez*, 416 U.S. 396 (1973), should apply. The *Martinez* standard effects the appropriate mutual accommodation between institutional needs and objectives and the demand of the Constitution when incidental restrictions are imposed on retained fundamental rights.

Accordingly, the Court should affirm the ruling of the Eighth Circuit that a heightened standard of review under *Procunier v. Martinez* is appropriate in evaluating whether the marriage regulations further a substantial governmental interest.

ARGUMENT

POINT I

AN INMATE'S RIGHT TO MARRY IS A PROTECTED ASPECT OF THE FUNDAMENTAL RIGHT OF PRIVACY.

A. The Marriage Relationship Is a Fundamental Constitutional Right.

This Court has consistently recognized that the right to marry is a fundamental personal right implicit in individual liberty. *Bowers v. Harwick*, ____ U.S.____, 106 S. Ct. 2841, 2843 (1986); *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) ("[M]arriage involves interests of basic importance in our society"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("the freedom to marry has been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Marriage is "an association for as noble a purpose as any involved in our prior decisions."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (Marriage is "fundamental to the very existence and survival of the race.")

Until *Zablocki*, the Court's recognition of the special solicitude accorded marriage in our society was incidental to its consideration of other zones of privacy implicit in the fourteenth amendment, such as: procreation, *Skinner v. Oklahoma*, 316 U.S. at 541-42; contraception, *Griswold v. Connecticut*, 381 U.S. at 485-86, 453-54; family relationships, *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977);

child rearing and education, *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 639-40 (1974). In *Zablocki*, the marital relationship was accorded constitutional protection distinct from, but equivalent to, that applied under the due process clause to the intimate aspects of the right of privacy. The Court pointed out:

> It is not surprising that the *decision to marry* has been placed on the same level of importance as decisions relating to procreation, childbirth, childrearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to *the decision to enter into the relationship* that is the foundation of the family in our society.

Id. at 386 (emphasis added). The "individual's interest in making the marriage decision independently" was deemed to be sufficiently important to merit special constitutional protection. *Id.* at 404 (Stevens, J., concurring.). Accordingly, the Court stated after *Zablocki* that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting [other choices]." *Roberts v. United States*, 468 U.S. 609, 620 (1984).

B. The Constitutional Significance of the Marital Relationship Is Not Diluted by Incarceration.

Petitioners concede that the right to marry is a fundamental right. Pet Br. at 30. Nonetheless, they suggest, as they argued directly in the courts below, that inmates are not deprived of a constitutionally protected marital relationship by their denial of a marriage ceremony in prison, implying that a marriage formed during incarceration is not a real marriage. Pet Br. at 30, 38 n.6. For that proposition, petitioners rely on *Butler v. Wilson*, 415 U.S. 953 (1974), decided before *Zablocki*, which summarily affirmed the judgment of a three-judge district court in *Johnson v. Rockefeller*, 365 F. Supp. 377 (S.D.N.Y. 1973). Pet. Br. at 30.

Johnson involved a challenge to the constitutionality of a New York statute which prohibited unmarried life inmates from marrying and terminated the marriages of persons sentenced to life imprisonment as a consequence of the imposition of a life sentence. The majority held that the statute did not violate the fundamental right to privacy by absolutely preventing inmates from marrying. The court reasoned that since the fact of incarceration prevented participation in the usual attributes of marriage—such as cohabitation, sexual relations and procreation—the only thing affected by the statute was a mere ceremony, not a fundamental constitutional right. *Johnson*, 365 F. Supp. at 380.[6]

Johnson represents an unduly restrictive view of marriage and is inconsistent with *Zablocki*.[7] Although certain rights of association and physical intimacy are necessarily limited by confinement, the remaining, unaffected elements of an inmate's marriage are substantial and meaningful. As the Eighth Circuit stated in rejecting the rationale of *Johnson*, inmate marriages, like others, possess all the same "elements of emotional support and public acknowledgement and commitment which are central to a marital relationship." *Safley v. Turner*, 777 F.2d at 1314. These aspects of inmates' marriages were summarized by Judge Lasker in his separate opinion in *Johnson*:

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6 The Court, in summarily affirming *Johnson*, did not necessarily decide that a marriage during confinement loses its constitutional protection because of the absence of cohabitation, sexual relations and procreation. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The Court would have affirmed the judgment in *Johnson* even if it recognized the fundamental nature of a marriage in prison but concluded that the governmental interest asserted by the state in support of the denial of the right—punishment of crime—was sufficiently important to justify the deprivation. In his separate concurring opinion in *Johnson*, Judge Lasker reached both conclusions. 365 F. Supp. at 381-82.

7 Since the pivotal criteria for constitutional protection in *Johnson* is participation in the intimate aspects of marriage, prior marriages and relationships that did not result in marriage before confinement would be equally affected.

> [T]he formalized commitment [of marriage] is vital not only as an emotional support during the period of incarceration, even if it be actually for life, but also as a solemn undertaking to the panoply of the marriage relationship in the event of the prisoner's release by parole or commutation, possibilities which become actualities in a significant number of cases. It is no answer that in such an event the parties would be free to marry, for the passage of years without the existence or possibility of even a formalized emotional commitment will almost certainly mean that the wife-to-have-been will have built her life elsewhere.

365 F. Supp. at 382 (Lasker, J., dissenting in part). Similarly, this Court recently recognized that "the constitutional shelter afforded [marriage] reflects the realization that individuals draw much of their emotional enrichment from close ties with others . . . ." *Roberts*, 468 U.S. at 619.

In addition, many marriages entail solemn religious commitments, not merely secular contracts.[8] For incarcerated individuals who request religious rather than civil ceremonies, the right to make a marriage decision is not merely "a vital personal right," *Loving v. Virginia*, 388 U.S. at 12, but an exercise of personal religious faith under the first amendment as well.[9] Such religious marriage commitments obviously can

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8 Almost every religion accords substantial spiritual significance to the commitment of marriage. For example, marriage is a "holy sacrament" for Catholics, *Code of Common Law* 411 (1983); a right of "holy matrimony" for Protestants, *Constitution & Canon: The Episcopal Church* 49 (1985); and a "sacred covenant of wedlock" for Jews, *Encyclopedia Judaica* 1032 (1971), *citing* Talmud (Ket. 7b).

9 This case does not present, and the Court need not decide, whether the deprivation of the right to participate in certain religious ceremonies violates the first amendment. Rather, the significance of the religious aspect of the marriage commitment demonstrates that inmate marriages, even without cohabitation and sexual intimacy, entail meaningful and substantial individual privacy interests.

be made without procreation and cohabitation. *E.g.*, Documents of Vatican II, *Church Today* at 255 (Abbott ed.); Elwell, *Evangelical Dictionary of Theology* 694 (1984); Borowitz, *Reading The Jewish Tradition on Marital Sexuality*, Journal of Reform Judaism 2 (1982).

Although the Court has never considered whether the absence or limitation of the intimate aspects of a marital relationship results in its loss of constitutional protection, most lower courts that have considered the question since *Zablocki* have concluded that such a marital relationship does not lose its constitutional status in prison. *See Safley v. Turner*, 777 F.2d at 1313; *Bradbury v. Wainwright*, 718 F.2d 1538, 1540 (11th Cir. 1983); *Lockert v. Faulkner*, 574 F. Supp. 606, 608-09 (N.D. Ind. 1983); *Salisbury v. List*, 501 F. Supp. 105, 108 (D. Nev. 1980); *In re Carrafa*, 77 Cal. App. 3d 788, 143 Cal. Rptr. 848 (1978); *cf. Vance v. Rice*, 524 F. Supp. 1297, 1299 (S.D. Iowa 1981) (pre-trial detainee). *Contra Wool v. Hogan*, 505 F. Supp. 928, 932 (D. Vt. 1981); *Holden v. Department of Corrections*, 400 So.2d 142 (Ct. App. Fla. 1981); *Department of Corrections v. Roseman*, 390 So.2d 394 (Ct. App. Fla. 1980).[10]

The premise of *Johnson* that a constitutionally protected marriage requires the demonstrable ability to participate in all of the elements of traditional marriage is antithetical to this Court's pronouncements in protecting personal liberties. *E.g.*, *Griswold v. Connecticut*, 381 U.S. at 485-86. In *Griswold*, a principal reason for the Court's invalidation of a statute prohibiting the use of contraceptives by a married woman was the offensive spectre of government investigations into such intimate conduct to determine whether the statute was violated. 381 U.S. at 485-86. The *Johnson* rationale requires the ability to participate in the intimate aspects of the right to privacy as a predicate to constitutional protection of the fundamental right to marry. The approach in *Johnson* represents judicial intrusion into intimate aspects of a relationship that, under *Zablocki*, is a part of the fundamental right to privacy. Just as courts should not scrutinize a marital relationship that is devoid of physical intimacies for other reasons—such as physical handicap, geographical separation or choice—they should refrain from such inquiry with respect to incarcerated individuals.[11]

The *Johnson* approach is constitutionally unacceptable today. The Court in *Roberts* made clear that the due process clause does not protect intimate conduct only, but rather "affords the formation and preservation of certain kinds of *highly personal relationships* a substantial measure of sanctuary from unjustified interference by the State." 468 U.S. at 618 (emphasis added). The decision to marry of an inmate and non-prisoner, or the decision of two inmates, represents the formation of such a personal relationship.

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10 Every pre-*Zablocki* decision of which we are aware denying the fundamental character of an inmate's right to marry has relied exclusively on *Butler v. Wilson*, 415 U.S. 953 (1974). *Hudson v. Rhodes*, 579 F.2d 46 (6th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 919 (1979); *Polmaskitch v. United States*, 436 F. Supp. 527 (W.D. Okla. 1977); *Muessman v. Ward*, 95 Misc. 2d 478, 408 N.Y.S.2d 254 (Sup. Ct. Queens Co. 1978); *cf. Fitzpatrick v. Smith*, 90 A.D.2d 974, 456 N.Y.S.2d 902 (4th Dep't 1982) (mem.), *aff'd mem.*, 59 N.Y.2d 916, 466 N.Y.S.2d 318, *cert. denied*, 464 U.S. 963 (1983).

11 In addition, the implicit premise in *Johnson* that an inmate's marriage is not a "real" marriage also ignores the meaningful opportunities that exist in prison to develop and maintain personal relationships, especially marital relationships. For example, the New York Department of Correctional Services permits contact visits. N.Y. Admin. Code tit. 7 § 200.4(k) (1986). In addition, the Family Reunion Program of the New York Department of Correctional Services permits approved inmates to participate at the prison in private weekend visits with legal spouse and other family members. N.Y. Admin. Code tit. 7 § 220 (1985). The primary objective of this program is to "preserve, enhance and strengthen family ties," with the goal of reducing further criminal activity after release. N.Y. Dep't. of Correctional Services, *Follow-up Survey of Participants in Family Reunion Program* 1 (1986). Because participation in the program is a privilege subject to the approval of prison officials, it also has a substantial, positive influence on behavior and discipline during incarceration. N.Y. Dep't. of Correctional Services, *The Family Reunion Program's Impact on Discipline* (1981).

POINT II

PRISON REGULATIONS WHICH DENY THE RIGHT TO MARRY SHOULD BE SUBJECTED TO A HEIGHTENED STANDARD OF REVIEW.

The regulations and practices challenged in this case affect the right of inmates to marry in two distinct ways—they regulate the procedures for entering into a marriage while in prison and they determine whether an inmate should be permitted to marry at all based on the acceptability of the marriage partners and the reasons. While prison officials may be accorded some measure of deference concerning the manner in which a marriage ceremony is performed in prisons, they should be held to a demanding standard when they seek to prohibit the formation of as venerated and highly personal a relationship as marriage.

We do not contend that prison administrators may not establish reasonable procedural criteria governing the performance of a marriage ceremony in prison. This would include reasonable regulations governing, for example, the number of participants and the day, time or location of the ceremony. Where such restrictions are rationally related to legitimate penological concerns, a deferential standard of review is properly applied. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Block v. Rutherford*, 468 U.S. 576 (1984). However, petitioners have far exceeded their authority to establish procedural criteria for prison weddings. Petitioners arrogate plenary power over the marriage decision and the choice of marriage partners. Marriage cannot be prohibited under the guise of setting regulations concerning the manner of entering into a marital relationship. *Zablocki v. Redhail*, 434 U.S. at 404 (Stevens, J., concurring); *cf. Boddie v. Connecticut*, 401 U.S. 371.

A. Marriage Is Fully Compatible with Penological Objectives.

Petitioners claim a right to unfettered authority over the merits and existence of marriage relationships in prison based on their view that marriage is inherently detrimental to prison goals and therefore is properly subject to absolute control in prison. Petitioners' bald assertions about inmate marriage are self-serving and distorted.

An inmate's decision to marry and, within certain limits, the marital relationship are neither inconsistent with confinement nor detrimental to legitimate penological objectives. Although an inmate's marital intimacy and association opportunities are necessarily limited as a result of confinement, the marriage union is not.

The official policies of numerous correctional agencies demonstrate that the right to marry is fully harmonious, not inconsistent, with penological concerns. The New York State Department of Correctional Services prison policies provide that "any inmate may marry providing there are no legal impediments to the marriage." Directive 4201 (1979).[12] Many states by statute or regulation similarly permit inmates to freely marry during incarceration. *See* Note, *Prison Inmate Marriages: A Survey and A Proposal*, 12 U. Rich. L. Rev. 443, 450-58 (1978). And, as the Solicitor General points out, "[t]here is no comparable federal regulation" relating to inmate marriages in the federal prison system. Brief for the United States, at 2. The American Bar Association Committee

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12 Directive No. 4201 provides in pertinent part:

> A major Departmental objective is to foster ties to the community that will help create stability in the inmate's personal life. The Department recognizes that a marriage can assist in creating that personal stability. Accordingly, the Department will provide appropriate assistance to inmates who wish to become married. The Department also recognizes that the person's confinement will in itself present impediments and difficulties to the contracting of a marriage during that period of confinement. . . . Any inmate may marry providing there are no legal impediments to the marriage.

on Standards for Criminal Justice also recommends that conviction or confinement should not deprive a person of the right to enter into a marriage. 4 ABA Standards for Criminal Justice, Standard 23-8.6 (2d Ed. 1980).

In addition, empirical studies demonstrate that family ties, especially the marital relationship, have a positive effect on inmates' morale and discipline during incarceration and reduce recidivism after release. *E.g*, Leg. Doc. 84, Memorandum of the Law Revision Commission of the New York State Legislature A-520, 529 (1984) (recommending repeal of statute restricting right to marry during life sentence) *citing* Cal. Dep't of Corrections, *Explorations in Inmate-Family Relationships*, (1972); Howser & MacDonald, *Maintaining Family Ties*, Corrections Today 96-98 (1982); N.Y. Dep't. of Correctional Services, *Follow-up Survey of Participants in Family Reunion Program* (1979); N.Y. Dep't. of Correctional Services, *Follow-up Survey of Post-Release Criminal Behavior of Participants in Family Reunion Program* (1980); N.Y. Dep't. of Correctional Services, *The Family Reunion Program's Impact on Discipline* (1981); and Howser, *Impact of Family Reunion Program on Institutional Discipline*, J. of Offender Counseling, Services & Rehabilitation 28 (1984).

Based on its experience with programs designed to maintain family and marital ties, The New York Department of Correctional Services has concluded that such ties are positively related to successful post-release adjustment and prison discipline. See n.10, *supra*. In addition, the Correctional Association, based on its own investigation, has submitted recommendations to the New York Legislature that such programs be expanded. The Correctional Association of New York, *State of the Prisons* 55 (1986). Thus, far from being detrimental to penological objectives, the stability and self-respect afforded by a marital relationship greatly enhances the attainment of penological goals.

B. Marriage Is Not Inconsistent with an Individual's Status as Prisoner or Necessarily Restricted by Confinement.

The fact that marriage does not by its nature implicate any legitimate penological concerns distinguishes it from those rights—such as the freedom to associate and to be free from unreasonable searches—which are necessarily restricted by confinement and therefore amenable to a deferential standard of review. *Jones*, 433 U.S. 119, *Wolfish*, 441 U.S. 520; *Rutherford*, 468 U.S. 576. The deferential standard of review does not apply where retention of the right and the goals of confinement are not mutually exclusive. *See Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985) (Kaufman, C.J.).

Jones involved the right to organize and solicit membership in an inmates' labor union. The Court recognized that such associational activity "would rank high on anyone's list of potential trouble spots" in prison. 433 U.S. at 133. *Wolfish* involved restrictions on items sent to pretrial detainees from outside the prison and limitations on physical privacy resulting from security searches. *Rutherford* also involved limitations on physical privacy and restrictions on contact visits.

Those rights are fundamentally inconsistent with life in prison. *Pell v. Procunier*, 417 U.S. 817, 826-27 (1983) (segregating convicted individuals is a "central task" of prison confinement); *Hudson v. Palmer*, 468 U.S. 517, 527 (1983) (privacy in prison is "fundamentally incompatible with the close and continued surveillance of inmates in their cells"). In those cases, the determinative factor for judicial deference to the discretion of prison officials was the fact that retention of the rights was irreconcilable with the central goals of prison confinement. Because the Court recognized that striking the appropriate balance necessarily entailed expertise concerning the prison environment, it adopted a deferential standard of review of state action affecting such rights. *Jones*, 433 U.S. at 132; *Wolfish*, 441 U.S. at 551; and *Rutherford*, 468 U.S. at 584-85.

By contrast, marriage and confinement obviously are not incompatible. Marriages are not terminated upon entering prison. The desire to enter into a marriage and the selection of the person to whom the commitment is made has no relationship to the ability of prison officials to operate a prison. It involves only the right to a time-honored associational status and to establish that philosophical and emotional commitment which this Court recognizes is a traditional and basic yearning of the human spirit. *See Bowers v. Hardwick*, 106 S. Ct. at 2844; *Zablocki v. Redhail*, 434 U.S. at 383-86; *Griswold v. Connecticut*, 381 U.S. at 468. Although the fact of marriage carries with it significant meaning in the minds and emotions of the married individuals, to prison officials it results primarily in a change of status from single to married. The regulation restricts the ability to enter into that new status. Since that status is not naturally restricted by confinement or antagonistic of penological goals, there is no reason for the Court to defer to the untrained and arbitrary decisions of prison officials as to the acceptability of the marriage partners or the merits of the marriage decision.[13]

C. A Heightened Standard of Review Applies to the Deprivation of Fundamental Rights in Prison.

The Court recognized in *Procunier v. Martinez*, 416 U.S. 396, 409 (1973), that where prison officials attempt to prohibit the exercise of a fundamental right that is not necessarily limited by confinement or penological goals, a heightened standard of review should apply.

In *Martinez*, the Court established a heightened scrutiny standard of review for prison regulations censoring the content of letters sent by non-prisoners and inmates alike. 416 U.S. at 413. The Court recognized that the right of free expression and communication is neither inconsistent with a person's status as

13 Prison officials nonetheless would be able to regulate activities of the marital partners in prison, such as access to furlough programs, visitation, and conjugal visit programs.

prisoner nor incompatible with penological goals. *Id.* at 412. The Court stated that any intrusion on protected speech rights must be unrelated to the expression of suppression. *Id.* at 413. Accordingly, the Court established a standard of review for *incidental* restrictions on retained fundamental rights necessitated by the demands of legitimate penological concerns. *Id.*

The Court thought it was unnecessary to reach the question of the standard of review applicable to inmates' first amendment rights and instead decided the issue based on the regulation's effect on non-prisoners. *Id.* at 408-09. The Court held that such incidental restrictions "must further an important or substantial governmental interest [and] be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413. In formulating that standard, the Court expressly weighed the demands of the prison setting in light of the Court's firm policy of deference to prison officials. *Id.* at 404-05. The *Martinez* standard therefore reflects the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution" for incidental restrictions on retained fundamental rights. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1973).

Even when non-prisoner rights have not been involved, the Court has invoked the same demanding standard of review in evaluating prohibitions on other fundamental rights of inmates. *Jones v. North Carolina Prisoners Labor Union, Inc.*, 433 U.S. at 133. In *Jones*, the Court considered the constitutionality of the outright ban on union organizational activities. The Court upheld the prohibition, stating that "the regulations are drafted no more broadly than they need to be to meet the perceived threat—which stems directly from group meetings and group organizational activities of the Union." 433 U.S. at 133, citing (*Procunier v. Martinez*, 416 U.S. at 412-16). Thus, even with respect to rights that must be limited in prison, such as association, the Court has applied the *Martinez* least restrictive alternative requirement where a particular exercise was altogether foreclosed. In *Pell v. Procunier*, the Court stated

clearly that the demands of confinement and security "would not permit prison officials to prohibit all expression or communication by prison inmates . . . ." 417 U.S. at 817.

A standard of heightened scrutiny applies to petitioners' regulations and practices under *Martinez* and *Jones*. Like the speech right in *Martinez*, marriage is not inherently limited by confinement or detrimental to penological objectives and therefore may be subject only to incidental restrictions in furtherance of legitimate penological objectives. In addition, arrogating to prison officials the absolute right to make important marriage decisions constitutes a form of censorship comparable to that in *Martinez*. If prison officials cannot dictate what a person can communicate to his chosen spouse in the absence of a substantial justification, they certainly should not be allowed to determine whether that person would make a worthy marriage partner without comparable justification.

In addition, like the ban in *Jones*, the denial of the right to marry the chosen spouse constitutes an absolute deprivation of the constitutional right to make a marriage decision and form a marital relationship. Since the Court in *Jones* applied a demanding standard of review to regulations governing the right to associate which by its nature must be restricted by confinement, there is even greater reason to apply it in this case where the right is not so restricted.

Consistent with this view, every lower court concluding that inmates possess a fundamental right to marry has applied the *Martinez* or stricter standard to evaluate restrictions on the right in the prison setting. *See Safley v. Turner*, 777 F.2d at 1313; *Bradbury v. Wainwright*, 718 F.2d at 1540; *Lockert v. Faulkner*, 547 F. Supp. at 608-09; *Salisbury v. List*, 501 F. Supp. at 108; *In re Carrefa*, 77 Cal. App. 3d at 851; *Vance v. Rice*, 524 F. Supp. at 1299.

The *Martinez* standard should apply here for the additional reason that the Missouri marriage regulations, like the correspondence regulation in *Martinez*, implicates the rights of

non-prisoners as well as inmates.[14] A non-prisoner spouse-to-be who is not permitted to marry the chosen individual suffers an abridgement of the right to marry as plain as that which results from denying the inmate the right to marry. *See* Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275 (1985). It would be inconsistent with *Martinez* were the rights of non-prisoner spouses, unlike non-prisoner correspondents, relegated to an undemanding standard of review of the abridgement of a fundamental right because of the identity or status of the person with whom the non-prisoner chose to exercise the right.

Petitioners' assertion that "there is little reason to apply the [*Martinez* test] after the advent of" *Jones, Wolfish* and *Rutherford* rests upon an erroneous conclusion that those decisions settled the issue expressly reserved by the Court in *Martinez*—the standard of review applicable to prisoner's fundamental speech rights and, by implication, other fundamental rights not necessarily effected by confinement. Pet. Br. at 31. To the contrary, the Court found the regulation in *Wolfish* restricting receipt of hardcover books to be only a content-neutral time, place and manner restriction "barely implicating speech rights." *Jones*, 433 U.S. at 130. *Rutherford* did not involve fundamental speech rights at all, but rather association rights. And in *Jones*, the Court applied the least restrictive alternative analysis to the ban on organizational activity. Accordingly, the Court's decisions in those cases stand as an adoption, not an implicit rejection, of the applicability of the *Martinez* standard for inmates seeking to exercise retained fundamental speech rights or fundamental liberty interests.

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14 Petitioners recognize that the regulations at issue govern inmates seeking to marry non-inmates. Pet. Br. at 40. In addition, one inmate witness testified at trial that she was prohibited under the regulations from marrying a non-inmate. Vol. III at 67-68. And immediately after trial petitioners denied respondent Henderson's request to marry a non-inmate. Resp. Br. at 18.

Moreover, in propounding the "reasonableness" standard in *Wolfish*, this Court rejected a compelling-necessity standard only insofar as an abstract due process right was claimed. 441 U.S. at 534. The Court distinguished the due process right in that case on the ground that it "[does] not rise to the level of those fundamental liberty interests delineated in such cases as *Roe v. Wade*, 410 U.S. 113 (1973)," and its progeny. *Id.* at 534-35. Under *Zablocki*, the right to marry is such a fundamental liberty interest. By comparing the abstract due process rights asserted in *Wolfish* to other fundamental individual liberty interests, the Court must have viewed such liberty interests to be in a different category than those rights not important enough for a heightened standard of review.

The Court has recognized that the exigencies of governing persons in prison, while different from those governing others, do not eliminate the need for reasons imperatively justifying the nature and scope of a deprivation of a fundamental constitutional right. *Martinez*, 416 U.S. at 413, 424; *cf. Healy v. James*, 408 U.S. 169, 180 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503, 506-09 (1969). Although the prison setting affects the *degree* of intrusion that the Constitution will tolerate on the free exercise of a fundamental right in that environment, it does not determine the *standard* applicable to judicial review of that intrusion. Where the right is not naturally restricted by confinement or detrimental to legitimate penological interests, such as speech and marriage, it survives incarceration. *Bell v. Wolfish*, 441 U.S. at 545-46. Under those circumstances, the standard established in *Martinez* for evaluating incidental restrictions on retained fundamental rights should apply.

POINT III

APPLYING THE STANDARD OF HEIGHTENED SCRUTINY TO MARRIAGE REGULATIONS WILL NOT UNDULY BURDEN PRISON ADMINISTRATION.

Applying the *Martinez* standard to the marriage regulations will not unduly burden prison officials in taking necessary actions to address any legitimate institutional concerns. Petitioners certainly are entitled to address the asserted concerns—escape and violence—as they would if those activities were engaged in by any other inmate.[15] The existence of a marital relationship is irrelevant to the unacceptable conduct. Obviously, if the threats exist at all, they exist whether or not a marriage occurs.

Moreover, petitioners have at their disposal a full range of measures for controlling conduct without prohibiting the formation of a marital relationship, such as the use of disciplinary proceedings, *Wolff v. McDonnell*, 418 U.S. 539; administrative confinement based on no more than rumor or surmise, *Hewitt v. Helms*, 459 U.S. 460 (1983); restrictions on correspondence upon a proper showing, *Procunier v. Martinez*, 416 U.S. 396; administrative transfers, *Meachum v. Fano*, 427 U.S. 215 (1976); cell and body searches, *Bell v. Wolfish*, 441 U.S. 520; restrictions on visitation, *Rutherford*, 468 U.S. 576, to name a few. Far from stripping petitioners of the ability to take action necessary to maintain security, order or rehabilitation, apply-

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15 Petitioners also assert an interest in "rehabilitation" and argue that courts should defer to the judgment of prison officials that a particular marital relationship would be detrimental to rehabilitation. Pet. Br. at 30. However, petitioners' insistence on judicial deference finds no support in the decisions of this Court. In *Wolfish*, *Rutherford* and *Jones*, this Court emphasized that prison officials, by virtue of their training and experience in running prisons, possessed unique expertise on corrections matters. By contrast, prison officials have no expertise in marriage, family, psychological or spiritual counseling to warrant deference to their judgments as to whether a particular marital relationship will be beneficial for the spouses-to-be.

ing the *Martinez* standard will have only the effect of invalidating unnecessary action or actions which sweep unnecessarily broadly.

In addition, applying the *Martinez* standard to state action affecting an inmate's decision to marry either a non-prisoner or another inmate will not prevent prison administrators from dealing with the greater or lesser threats to safety, security or rehabilitation that each may entail. If, as petitioners contend, "the security concerns are different when dealing with two incarcerated felons" (Pet. Br. at 40), then the scope of the necessary state action will be commensurately different. Applying the *Martinez* standard to both situations will simply mean that prison officials make take appropriate action, short of denying requests to marry where less restrictive measures will suffice.

CONCLUSION

Marriage is a fundamental right that does not cease to be protected by the Constitution upon confinement in prison. The Correctional Association has found, as have the New York State Department of Correctional Services and numerous other penological experts, that marriage has a highly positive influence in the prison environment. Regulations and practices frustrating or preventing marriage in prison, such as those of the Missouri Department of Corrections, disserve penological goals and constitute an unnecessary intrusion on the constitutionally protected right to marry. Accordingly, the decision of the Eighth Circuit, applying a heightened standard of review under *Procunier v. Martinez* in evaluating the regulations and practices of the Missouri Department of Corrections, should be affirmed.

Dated: New York, New York
September 8, 1986

Respectfully submitted,

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85-1384

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO. 85–1387

WILLIAM R. TURNER, et al.,
Employees of the Department of Corrections and Human Resources for the State of Missouri,
Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,
Respondent.

DR. LEE ROY BLACK, et al.,
Employees of the Department of Corrections and Human Resources for the State of Missouri,
Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,
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ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER OF ARKANSAS, CALIFORNIA, IOWA, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA AND VIRGINIA

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QUESTION PRESENTED

Whether the lower court erred in applying the strict scrutiny standard of *Procunier v. Martinez* to a prison regulation which prohibits correspondence between inmates who are not members of an immediate family?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The undersigned states submit this brief as Amici Curiae in support of the Petitioner. The Amici urge that the decision of the United States Court of Appeals for the Eighth Circuit in these proceedings, *Safley v. Turner*, 777 F.2d 307 (8th Cir. 1985), be reversed.

INTEREST OF AMICI

The individual states appearing as Amici are responsible for the supervision and control of all inmates incarcerated in penal institutions within their respective states. Many of these states are under the jurisdiction of the Eighth Circuit Court of Appeals. A primary concern of the Amici is maintaining the security, order and discipline in each of their penal institutions. These states share the belief that virtually unrestricted correspondence between inmates jeopardizes the lives of inmates and employees and the security and order of the institution.

The Amici respectfully request leave of the Court to file this brief in support of the Petitioner in this case because of the constitutional significance of the issues and because of the impact which any decision will have upon the administration of state penal institutions.

SUMMARY OF THE ARGUMENT

Inmates retain only those First Amendment rights which are not inconsistent with their status as prisoners or with the legitimate penological objectives of the correctional system. Generally, constitutional challenges to prison regulations based on the First Amendment are subject to rational basis standards. If the restriction on First Amendment rights is rationally related to an important or substantial state interest and the restriction is not an exaggerated response to that interest, the restriction does not violate the First Amendment rights of inmates. In one instance, the strict scrutiny standard has been applied to a prison regulation which affected the First Amendment rights of non-incarcerated individuals. In that case, the Court held that to withstand a First Amendment attack, the regulation must

further an important or substantial governmental interest and the limitation of First Amendment freedoms must be no greater than necessary or essential to protect the particular governmental interest involved.

In this case, a strict scrutiny standard was applied to a prison regulation which prohibited correspondence between inmates who were not members of an immediate family. The extension of the strict scrutiny standard to inmate-to-inmate correspondence does not accord due deference to prison officials in dealing with security concerns created by such correspondence. This lack of deference severely undercuts prison officials' ability to protect inmates who have provided confidential information in prison disciplinary actions or who have testified on behalf of the state against a co-defendant in the criminal trial. It also lessens the impact of separating inmates who have been disciplinary problems or who have created security problems at a single institution. Further, it creates the possibility that contemporaneous disturbances or escape attempts could be planned at separate institutions, thereby lessening the ability of prison officials to react to such occurrences.

This Court is urged to adopt a standard for inmate-to-inmate correspondence which allows prison officials the discretion which is necessary to allow the use of their professional expertise in dealing with security concerns. Accordingly, the Amici request that the constitutionality of restrictions on inmate-to-inmate correspondence be determined under the rational basis standard.

ARGUMENT

I. THE LOWER COURTS ERRED IN FINDING THAT A STRICT SCRUTINY STANDARD, RATHER THAN A RATIONAL BASIS STANDARD, WAS APPLICABLE TO A PRISON RULE WHICH PROHIBITED CORRESPONDENCE BETWEEN INMATES WHO WERE NOT MEMBERS OF AN IMMEDIATE FAMILY.

The United States District Court for the Western District of Missouri held that the strict scrutiny standard which is set forth in *Procunier v. Martinez*, 416 U.S. 393, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), rather than the rational basis standard as set forth in *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), was applicable to a prison rule which restricted correspondence between inmates to correspondence between members of an immediate family The United States Court of Appeals for the Eighth Circuit affirmed. In so holding, the Court of Appeals rejected the rational basis standard because inmate-to-inmate correspondence did not involve presumptively dangerous activity like a prisoners' union in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). The Court also held that the restriction in question was not a time, place or manner regulation which allowed alternative means of communication, as in *Pell v. Procunier.*

The Court of Appeals decision misreads *Jones v. North Carolina Prisoners' Labor Union, Inc.* In *Jones*, the Court held that prison regulations which prohibited inmates from soliciting other inmates to join the union, barred all meetings of the union and prevented the delivery of packets of union publications which had been mailed in bulk for redistribution, did not violat the First Amendment. *Id.*, 433 U.S. at 131. The Court of Appeals distinguished the decision in *Jones* by reasoning that the prohibited union activities were presumptively dangerous. In refusing to apply the rational basis standard to the restriction

in this case, the Eighth Circuit summarily concluded that mail between two inmates in two different institutions physically separated by many miles was not presumptively dangerous.

The creation of the concept of presumptively dangerous activities by the Court of Appeals cannot be supported by the *Jones* decision. This Court's decision in *Jones* emphasized the need for deference to decisions by prison officials in security matters. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 126-128, 132-133, n. 9; *see, Vester v. Rogers*, No. 85-6639 (4th Cir., July 18, 1986). It seems beyond dispute that inmate-to-inmate correspondence does create a potential danger to the security and order of penal institutions even where the inmates are incarcerated in separate facilities.

Such correspondence may increase the likelihood of attack by allowing for contracts or threats on the lives or well-being of inmates to be communicated to other institutions. For example, inmates whose lives are endangered by inmates in one facility may be transferred to another insitution.[1] Such a transfer may be necessary as a result of cooperating with prison officials in disciplinary actions. Similarly, a co-defendant who has turned state's evidence is generally placed in an institution other than one in which the co-defendant has been placed. If the identity of a suspected informant or witness is communicated to inmates in another institution, the individual's life may be in jeopardy. Attacks on past informants may cause inmates to be hesitant to cooperate in the future. *Hewitt v. Helms*, 459 U.S. 460, 463, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). Correspondence between inmates in these institutions may well be used as the means to transmit contracts on the lives of such inmates or to intimidate such inmates through threats.

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[1]In addition to intrastate transfers, inmates may be transferred to the Federal Bureau of Prisons pursuant to 18 U.S. § 5003 or to another state. Forty-two states are members of corrections compacts which allow for interstate transfer of inmates. *National Institute of Corrections Quarterly Summary*, 3rd Quarter, 1985, United States Department of Justice (Dec. 1985).

Transfers to other institutions which are used to separate inmates who have been disciplinary problems or who have created security problems at a single institution would be less effective. *See Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); *Prison Gangs – Their Extent, Nature and Impact on Prisons*, U.S. Department of Justice (July 1985). Inmate-to-inmate correspondence may allow such inmates to give continued encouragement in support of disruptive activities.

Inmate-to-inmate correspondence might be used to immeasurably complicate a riot or escape situation. If disturbances could be planned to occur at two or more separate institutions at the same time, efforts of prison officials to quell the disturbance at any of the individual institutions would most certainly be hampered by the necessary division of resources. The same effect may occur as a result of simultaneous escape attempts. The interest in preserving the order and security of the institution is self-evident in these examples. *See Hudson v. Palmer*, 468 U.S. ____, 104 S.Ct. 3194, 82 L.Ed.2d 393, 403 (1984). As a result, the reasoning of the Court of Appeals is contrary to the express requirement of deference by *Jones* since the Court merely substituted its opinion for that of prison officials.

The Court of Appeals also reasoned that the rational basis standard was not applicable because the restrictions on inmate-to-inmate correspondence did not allow alternate means of communicating with inmates in other institutions, as in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). In support of this conclusion, the Court of Appeals looked to other methods of direct correspondence between inmates such as phone calls and noted that none were available. However, the Court failed to consider at least one method of indirect correspondence between inmates in different institutions which was available. A prison policy clearly can allow inmates to exchange names and addresses of their relatives. The prison policy would also allow the sending of letters by each

of these inmates to nonincarcerated relatives who then could have exchanged news about each of the inmates. In *Pell v. Procunier*, this Court noted just such an alternative avenue of communication between inmates and members of the press. *Pell v. Procunier*, 417 U.S. at 825. *See Vester v. Turner*, No. 85–6639, slip opinion at pp. 10-11 (4th Cir. July 18, 1986) (where a similar restriction was found to be a reasonable time, place and manner restriction because it was not an absolute denial of free speech). In *Pell*, the Court stated:

> More importantly, however, inmates have an unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy or attorneys who are permitted to visit them at the prison. Thus, this provides another alternative avenue of communication between prison inmates and persons outside the prison.
>
> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and state officers who supervise their confinement is far more intimate than that of a state and a private citizen" and that the "internal problems of state prison involved issues . . . particularly within state authority and expertise. *Id.*

This alternative for indirect communication would alleviate many administrative problems which would be faced in monitoring direct inmate-to-inmate correspondence. Relatives outside the prison would be less likely to be knowledgeable of prison parlance and nicknames, and thus, the possibility of messages coded in such parlance would be substantially less. A non-incarcerated relative would be less likely to transmit contracts or threats on a inmate's life, or escape plans. Indirect communication is limited. However, this limitation is necessary to protect

the security needs of institutions. It does allow some means of communication while furthering the security interests of the institution and alleviating some of the administrative burdens which would be created by a policy which would allow inmate-to-inmate correspondence as a general rule.

In *Vester v. Rogers*, the Fourth Circuit Court of Appeals addressed the proper standard of review for a prison regulation prohibiting inmate-to-inmate correspondence without permission of the wardens of the respective institutions. The court expressly rejected the reasoning of the Eighth Circuit in this case as unpersuasive. *Vester v. Rogers*, No. 85-6639, slip opinion at p. 5. The court stated that the strict scrutiny standard applied only when a regulation intrudes upon the First Amendment rights of non-prisoners or constitutes a total denial of an inmates' right to free speech. *Id.*, at 9. The Court noted the need for deference to prison officials in addressing prison security concerns, *id.* at 8, and the alternate methods of indirect communication which are available to inmates. *Id.*, at 11. As a result, the Court examined the regulation under the rational basis test of *Pell*.

For these reasons, the lower courts erred in finding that the strict scrutiny standard of *Procunier v. Martinez* was applicable to the prison policy which prohibited correspondence between inmates who were not members of an immediate family, and the rational basis standard set forth in *Pell v. Procunier*, *Bell v. Wolfish*, and *Jones v. North Carolina Prisoners' Union, Inc.*, should have been applied.

CONCLUSION

For all of the above reasons, this Court is respectfully requested to reverse the decision of the United States Court of Appeals for the Eighth Circuit which applied the strict scrutiny standard of *Procunier v. Martinez* to a prison regulation prohibiting correspondence between inmates who are not members of an immediate family.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 1986, I did place the following "Brief for Individual States As Amici Curiae in Support of the Petitioner" in the United States mail, postage prepaid, and properly addressed as follows:

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